CRIMINAL LAW BULLETIN

Volume 14, Number 6

Contents

Criminal Law Bulletin is published 6 times a year, bimonthly, by Warren, Gorham & Lamont. Offices: *Business*, 210 South Street, Boston, Massachusetts 02111; *Editorial*, Prof. Fred Cohen, 23-8 Woodlake Rd., Woodlake Apts., Albany, N.Y. 12203. Second-class postage paid at Boston, Mass. Subscriptions: $34.00 a year in the United States, United States possessions and Canada. $44.00 a year elsewhere.

November-December 1978

1978 CASE DIGEST INDEX

Editor's Note: The cases in the Index have been classified to conform to the revised *Criminal Law Digest* (Second Edition), which was recently published by Warren, Gorham, and Lamont.

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1978 CASE DIGEST INDEX

PART I – STATE CRIMES

1. VALIDITY OF CRIMINAL STATUTES IN GENERAL

§1.00. Statute held not void for vagueness

Maryland Defendants convicted of child abuse contended on appeal that the Maryland child abuse statute was unconstitutionally vague and indefinite because the statute does not define the terms "cruel and inhumane treatment" contained in the definition of "abuse."

The statute under consideration is codified as Section 35A of Article 27 in the Maryland Code (1976 replacement volume). It defines "abuse" as follows:

> "7. *'Abuse'* shall mean any: (A) physical injury or injuries sustained by a child as a result of cruel or inhumane treatment or as a result of malicious act or acts by any parent, adoptive parent or other person who has the permanent or temporary care or custody or responsibility for supervision of a minor child. . . ."

The Maryland court held that the terms "cruel and inhumane treatment" in the context of the statute as a whole are not so vague and indefinite as to render the statute void for vagueness. Each term, the court continued, has a "settled common law meaning and commonly understood meaning which does not leave a person of ordinary intelligence in doubt as to its purport. . . ." State v. Magaha, 32 A.2d 477 (Md. 1943).

The defendants also contended that the statute does not clearly define or name the class of persons to whom it applies. To this contention, the court ruled that the terms "any parent, adoptive parent or other person . . ." are sufficiently explicit to inform a person of ordinary intelligence whether or not he comes within the class of persons against whom the statute is directed. Bowers v. State, 379 A.2d 478 (Spec. App. 1977), 14 CLB 263.

3. NATURE AND ELEMENTS OF SPECIFIC CRIMES

§3.130. —Dangerous and deadly weapons

Louisiana Defendant, convicted of armed robbery and sentenced to thirty years' imprisonment, appealed.

Among his assignments of error was that the robbery was not accomplished with the use of a dangerous weapon. Held, on appeal, affirmed.

The facts were as follows: Defendant approached the victim to apologize for a previous fight. Although the victim accepted the apology, he banned defendant from his place of business. As the victim turned toward defendant, defendant sprayed "Halt" into his eyes. ("Halt" is a chemical agent postmen carry for protection against dogs.) Then defendant beat the victim with his fists and rifled the victim's pockets, stealing about $25.

Although defendant raised the issue as to whether "Halt" is a dangerous weapon, he offered no argument to the Louisiana Supreme Court to support his bare assertion. Nonetheless, the court reviewed the record and ruled that the crime had been committed with the aid of a dangerous weapon; thus the armed robbery conviction was supported by the facts. State v. Robinson, 353 So. 2d 1001 (1978), 14 CLB 372.

Montana Defendant was convicted of aggravated assault. Held, on appeal, reversed, and dismissed on the ground that proof at trial fell short of establishing an

assault with a weapon "capable of being used to produce death or serious bodily injury" as required by the aggravated assault statute.

The facts were as follows: Complainant was struck by a projectile fired into his car by defendant. Although there was some variance in the evidence offered to show that a slingshot was used, the Montana High Court assumed that a slingshot was the device employed for purposes of its examination and decided as follows:

> "Even if we assume that the use of a slingshot was adequately proven, the record is barren of any testimony that the slingshot-projectile combination was in fact a weapon capable of producing death or bodily injury. No evidence was presented concerning the size, weight or shape of the projectile which struck the victim nor the velocity at which the slingshot was capable of propelling such projectile. The evidence indicated that VanDenBos received a bruise on the jaw requiring no hospitalization and that no bones were broken. Such proof falls far shot of establishing an assault with a weapon capable of being used to produce death or serious bodily injury as required by statute."

State v. Deshner, 573 P.2d 172 (1977), 14 CLB 371.

Virginia Defendant was convicted of entering a bank armed with a deadly weapon with intent to commit larceny and with the use of a pistol in the commission of a robbery.

On appeal, defendant conceded that he was guilty of common-law robbery but contended that his convictions of the statutory offenses should be reversed since the weapons used were not "deadly weapons."

The relevant statute states: "It shall be unlawful for any person to use or attempt to use any pistol, shotgun, rifle, or other firearm or display such weapon in a threatening manner while committing or attempting to commit murder, rape, robbery, burglary or abduction."

In rejecting defendant's claims, the court pointed to Johnson v. Commonwealth, 163 S.E.2d 570 (1968), wherein the court had rejected the contention that the state had the burden to prove that the weapon, a "blank pistol" with a "blocked" barrel, was capable of firing a projectile or missile.

When defendant entered the bank, the court concluded, he was wielding a pistol in the ordinary manner contemplated by its nature and design and was brandishing it as an offensive weapon capable of inflicting death or great bodily injury. The mere fact that the bullets were incapable of being discharged did not make the pistol any less deadly within the meaning of the statute. Cox v. Commonwealth, 240 S.E.2d 524 (1978), 14 CLB 371.

6. DEFENSES

§6.20. Entrapment

Alaska Defendants were convicted of various drug offenses. On appeal, they contended that the trial court erroneously ruled on their claim of entrapment and erroneously denied their discovery motion with respect to government agents' expense logs. Defendants argued that they needed those records to support the entrapment argument that the agents had presented them with the possibility of exorbitant gain, and had given the defendants quantities of gifts, money, and purchases in kind during the course of the investigation to entice them into acting.

Held, on appeal, reversed and remanded for hearing on issues of entrapment after examination of the expense logs. Alaska embraces the "objective" theory of entrapment which holds that

> "entrapment occurs when a public law enforcement official, or a person working in cooperation with him, in order to obtain evidence of the commission of an offense, induces another person to com-

mit such an offense by persuasion or inducement which would be effective to persuade an average person, other than one who is ready and willing, to commit such an offense."

Under the "objective" theory of entrapment, the defendant must carry the burden of establishing the defense by a preponderance of the evidence. In this light, the court concluded that the defendants clearly needed the agents' expense logs to see if an "aura" of friendship and the temptation of exorbitant gain could be established. Bateson v. State, 568 P.2d 973 (1977), 14 CLB 174.

§6.60. Self-defense

Colorado Defendant, convicted of first-degree assault, argued on appeal that he was unconstitutionally denied the use of a special justification defense available only under Colorado's criminal negligence statute. On appeal, held, reversed for new trial.

Under Colorado law the traditional defense of self-defense is available in an assault charge (a felony with a maximum sentence of forty years and minimum of five years). However, this defense reduces the degree of culpability in cases in which death results from criminally negligent conduct, as follows:

"(1) A person commits the crime of criminally negligent homicide if he causes the death of another person:

"(a) By conduct amounting to criminal negligence; or (b) He intentionally causes the death of a person in the good faith but unreasonable belief that one or more grounds for justification exist under [defense sections]."

Criminally negligent homicide carries a maximum penalty of two years in jail.

In sustaining defendant's arguments, the High Court rejected the state's argument that the expanded defense should not be available in assault crimes since elements in assault—notably intent to cause serious injury with a weapon—are not elements under the criminally negligent homicide statute.

The court ruled instead that the intent elements are not sufficiently distinguishable to warrant such different defenses. The court added that it is reasonable to guess that when death is intentionally caused only rarely will some sort of weapon *not* be involved. People v. Bramlett, 573 P.2d 94 (1977), 14 CLB 373.

District of Columbia Defendant, convicted of assault with intent to kill while armed and three other counts of assault appealed, contending that the trial court had improperly declined to give his requested jury instruction on the defense of another. Held, affirmed.

Earlier decisions of the Washington, D.C. appellate court had established that an accused is entitled to a requested jury instruction "if there is any evidence fairly tending to bear upon the issue . . . however weak."

In order to offer a viable defense based on defense of another, the intervenor must demonstrate that the victim of the attack was himself entitled to the defense of self-defense.

Defendant argued that Edwards (also convicted in the assault-robbery) was struggling to remove a gun from his pants when the security guard fired at him and continued to fire even after Edwards had fallen to the ground. The defendant urged the appellate court to rule that Edwards' collapse was a withdrawal on his part from his initial attack upon the guard, thus transforming the guard into the aggressor. Defendant had testified that he had drawn and fired his own gun only after the guard continued to fire upon the fallen Edwards.

The court rejected defendant's claim. The court concluded that at no time was Edwards, himself, the initiator of the rob-

bery, entitled to use deadly force against the guard (witnesses had testified that Edwards was the first to shoot).

Thus, the court rejected Taylor's arguments on two grounds. First, since Edwards could not justifiably return the fire of a security guard who was attempting to prevent a felony and who had been fired on first, Taylor likewise had no right to shoot. Second, since the case involved the actions of a person who is authorized to prevent crime, a bystander has no right to intervene in the officer's lawful discharge of his duties. Taylor v. United States, 380 A.2d 989 (Ct. App. 1977), 14 CLB 376.

PART II – STATE CRIMINAL PROCEDURES, ANCILLARY PROCEEDINGS

8. PRELIMINARY PROCEEDINGS

§8.45. Prosecutor's discretion to prosecute

U.S. Supreme Court Defendant was indicted for forgery and the prosecutor promised to recommend a five-year sentence instead of the maximum of ten if the accused would plead guilty. However, the prosecutor warned that if defendant refused to plead guilty, a second indictment would be filed alleging that defendant was a habitual offender. Conviction on this second charge would result in a sentence of life imprisonment. Defendant refused to plea bargain and was found guilty on both counts and sentenced to life. Defendant appealed, arguing that the prosecutor had violated his due-process rights by threatening an additional charge and carrying out the threat.

Held, convictions upheld. The Court said: "A rigid constitutional rule that would prohibit a prosecutor from acting forthrightly in his dealings with the defense could only invite unhealthy subterfuge that would drive the practice of plea bargaining back into the shadows from which it has so recently emerged."

While the Court conceded that it is unconstitutional to punish a person for exercising his due-process rights, these strictures do not apply to the plea-bargaining situation where the accused is free to accept or reject any offer made him.

The dissent, led by Justice Blackmun, argued that the majority had condoned "prosecutorial vindictiveness." Bordenkircher v. Hayes, 98 S. Ct. 663 (1978), 14 CLB 248.

10. PRETRIAL MOTIONS

§10.15. —Severance

Michigan Defendant was convicted of two counts of illegal sale of heroin. On appeal, he contended that it was error for the trial court to have denied his motion for severance.

Held, conviction reversed and remanded. After an extensive review of the record, the Michigan Supreme Court ruled that while defendant's conduct in selling heroin on the two dates was of a "same or similar character," it was not the "same conduct." Further, the court ruled that there was no single scheme or plan to connect the two transactions. Citing its earlier rulings and ABA "Standards Relating to Joinder and Severance," the court determined that the trial court had no discretion to deny defendant's timely motion. People v. Tobey, 257 N.W.2d 537 (1977), 14 CLB 171.

§10.40. Motion to dismiss for lack of speedy trial

Florida Police responding to a report of a shooting were told by a witness that defendant had shot the victim. The police

placed defendant in a patrol car and drove him to the police station where they gave him his *Miranda* rights and questioned him. Defendant was released without being arrested, placed in a cell, or fingerprinted.

About two months after the incident defendant was indicted and arrested. About four months after he was arrested defendant moved for discharge on the ground that more than 180 days had passed since the date of the incident when he was initially taken into custody.

On appeal, held, writ of prohibition denied. Although defendant may have been in custody for purposes of *Miranda*, the custody did not trigger the running of Florida speedy-trial rules.

> "A short protective or investigative custody is often advisable where, as in the instant case, a person is a suspect but the police do not believe they have enough evidence to arrest him. . . . To construe the speedy trial rule to mean that the time starts running every time the police take a suspect to the station for questioning could have a deleterious effect because the police might then feel compelled to make an arrest on less than sufficient evidence in order to activate the wheels of the prosecutorial process before the time runs out."

State *ex rel.* Dean v. Booth, 349 So. 2d 806 (Ct. App. 1977), 14 CLB 172.

12. GUILTY PLEAS

§12.00. Plea bargaining

District of Columbia Defendant, convicted of burglary, claimed on appeal that prosecutorial misconduct should vitiate the conviction. He argued that the government had refused to perform its part of a bargain to drop the charges against him in return for information regarding other crimes not involving the defendant.

Held, on appeal, conviction affirmed. Since no enforceable plea bargain had ever been struck, defendant should not now complain that the "bargain" was breached.

The appellate panel wrote that the correct point of inquiry is not whether the defendant had a "reasonable belief" that the charges would be dismissed if he cooperated with the police or prosecutor, but whether any agreement had been entered into.

However, the appellate panel noted that "it might have been a much better practice" for the Assistant United States attorney to discuss defendant's possible cooperation with defense counsel before engaging in ex parte conversations with the defendant. The court added that the defendant had not divulged any information about any of his own pending cases, but, rather, spoke with the prosecutor about other cases involving other people. It was this point that enabled the court to rule that the defendants' due-process rights were not violated when his appointed counsel was not told of the conversation in advance. Judge v. United States, 379 A.2d 966 (Ct. App. 1977), 14 CLB 268.

§12.01. —Defendant's right to specific performance

Delaware Defendant was indicted for first-degree murder and rape. Before trial, a plea bargain was negotiated under which defendant would plead guilty to second-degree murder and rape. In return the state would dismiss the first-degree murder charge. After the offer had been accepted but prior to entry of a plea by defendant, the prosecutor advised defense counsel that the state was withdrawing from the agreement. The trial court denied defendant's motion for specific performance of the plea agreement. The jury then found the defendant guilty as charged and he was sentenced to death for first-degree murder and to life imprisonment for rape.

Held, on appeal, the state would with-

draw the plea offer, but the sentence would be modified from death to life imprisonment without benefit of parole. (The Delaware death penalty statute had previously been declared invalid.) The Delaware Supreme Court permitted the state to withdraw its plea offer because defendant failed to establish reliance. Although defendant alleged that the state obtained valuable information from him by reason of the plea agreement, he never specified what information was revealed or what constitutional right was relinquished. Therefore, since the offer was withdrawn before defendant entered a guilty plea or took any other action constituting detrimental reliance, the judgment was affirmed. Shields v. State, 374 A.2d 816 (1977), 14 CLB 95.

§12.45. —Duty to advise defendant of possible sentence

Arizona Pursuant to a plea agreement, defendant pleaded guilty to one count of rape and two counts of first-degree robbery. On appeal, he argued that the trial court failed to inform him of the "nature and range of possible sentence for the offense to which the plea is offered" as required by Section 17.2 of the Rules of Criminal Procedure (Ariz. Rev. Stat. § 17-2(b)).

In rejecting defendant's appeal, the court noted that defendant had in fact been informed of the maximum and minimum sentence that could be imposed pursuant to the rape and burglary statutes under which he offered his guilty plea. Defendant's sole contention regarding the court's acceptance of his plea was that the trial court failed to inform him that, in addition to those sentences imposed for the rape and burglary offenses, he could also be fined up to $200 pursuant to a separate penal law section (Ariz. Rev. Stat. § 13-1647).

Since the fine was only a technical possibility and was not an operative element of the sentence which was imposed and did not affect the computation or effect of defendant's sentence or parole, the possibility of the imposition of the fine was not required to be disclosed under the Arizona Rules of Criminal Procedure. State v. Rogel, 568 P.2d 421 (1977), 14 CLB 176.

South Carolina Prior to his plea of guilty, defendant was informed by the court that a plea of guilty would bring a "substantial fine and no prison term." The court added that if defendant went forward to trial and was convicted he would be sentenced to one year.

Defendant chose to plead guilty to the charge of selling pistols without a state license.

Held, on appeal, remanded to permit withdrawal of guilty plea, since defendant had been unduly coerced as a matter of law.

While the South Carolina court expressed no opinions on the advisability of plea bargaining, the panel said that a plea influenced by the judge's inducements cannot be said to have been voluntarily entered. The agreement reached between the defense and prosecution must never be more than a recommendation to the judge, the court wrote, citing United States v. Werker, 535 F.2d 19 (2d Cir. 1976), and American Bar Association Standards.

Since defendant entered a guilty plea to avoid an assured prison sentence in the event of conviction, the court found that the trial court had overstepped its role. State v. Cross, 240 S.E.2d 514 (1977), 14 CLB 373.

13. EVIDENCE

ADMISSIBILITY AND WITNESSES

§13.20. Relevancy and prejudice

Kentucky Defendant was convicted of murder. At the trial, a detective had testified that a Social Security card found on

defendant at the time of his arrest had been issued to a Florida resident who had been murdered the previous year.

Held, on appeal, it was not error to admit this testimony since the statement was evidence of a collateral fact by which defendant's identity was established.

Defendant contended on appeal that the state had elicited the testimony so as to get before the jury evidence that he was the murderer. The court, however, was convinced that the information was probative on the issue of identity.

Williams (defendant) was known as Jimmy Windham. Virtually all witnesses at the trial referred to defendant as Jimmy Windham. The defendant had in his possession a Nebraska driver's license in the name of Jimmy H. Windham; a social security card was in the name of Henry Early Windham. Whether "Jimmy" was a nickname of Henry Windham needed to be established; it was also necessary to establish whether Ralph Williams was Jimmy Windham or Henry Windham. Williams v. Commonwealth, 560 S.W.2d 1 (1977), 14 CLB 369.

§13.85. Out-of-court experiments

Indiana Defendants were found guilty of the commission of a crime while armed and of assault and battery with intent to kill. In a motion before the trial court, defendants contended that any evidence concerning the pistol found in their possession when they were arrested should be excluded since the ballistics analysis failed to conclusively establish that the weapon was used to shoot the victim.

Held, on appeal, affirmed. The evidence concerning the pistol was properly admitted. Although the ballistics test was inconclusive, it goes to the weight of the evidence, not its admissibility. The appropriate test of relevancy is whether the evidence offered renders the desired inference more probable than it would be without the evidence. The fact that a small-caliber pistol was found in the possession of the defendants a short time after the victim had been shot strengthened the inference that the defendants were the assailants. Although the ballistics test was inconclusive, the fact that the markings of the slugs from the defendants' weapon were not identical would explain why the bullet from the victim and the weapon were not scientifically identified. Collins v. State, 364 N.E.2d 750 (1977), 14 CLB 93.

§13.130. —Voiceprint

Michigan Defendant was convicted of two counts of illegal sale of heroin. On appeal, one of the defendant's assignments of error was the trial court's admission of voiceprint evidence to corroborate the undercover agent's identification of defendant.

The Michigan Supreme Court reversed defendant's conviction holding that it was error to admit the voiceprint identification into evidence. The court pointed out that Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), limits the admission of scientific evidence to techniques which have become "sufficiently established to have gained general acceptance in the particular field in which it belongs." The court noted that the principal evidence offered in support of the reliability of voiceprints in almost every case in the United States consists of the testimony of three experts. These experts seem to be the only experts who offer testimony in voiceprint cases. After examining the case law concerning the admissibility of voiceprint evidence, the court concluded that the technique had not yet demonstrated solid scientific approval and support. People v. Tobey, 257 N.W.2d 537 (1977), 14 CLB 170.

§13.155. Privileged communications

Florida Kerlin, convicted of second-degree murder and sentenced to thirty years' imprisonment, contended on appeal that his wife should not have testified about what she *saw* her husband do in

connection with the killing of the victim. Held, on appeal, the husband-wife privilege does not extend to a spouse's observations of the other spouse's criminal activities.

Kerlin's wife, granted immunity by the state, recounted all that led up to the shooting: She told of seeing the victim's government check in her husband's possession; watched her husband take money from the victim's bank account; heard a muffled rifleshot, and observed blood on her spouse's face.

The Florida Supreme Court noted that in Wolffe v. United States, 291 U.S. 7 (1933), and again in Blau v. United States, 340 U.S. 332 (1950), the court seemed to say that the marital privilege should cover utterances but not observations of facts.

The Florida Supreme Court thus determined that public policy favors a restrictive reading of the marital privilege "since observations of criminal actions is not the type of communication contemplated by the privilege of confidential communication as being in the public interest to preserve a well-ordered, civilized society by preserving the peace and harmony of a family." Kerlin v. State, 352 So. 2d 45 (1977), 14 CLB 264.

§13.175. Immunity of witness from prosecution

Michigan Defendant, convicted of first-degree murder and sentenced to life imprisonment, claimed on appeal that the trial court should have ordered the prosecutor to confer a grant of immunity upon a defense witness.

Held, it was not error for the trial court to withhold an immunity grant. Under Michigan law, the state supreme court ruled, the prosecuting attorney is vested with the discretionary authority to petition for the granting of immunity for a witness in a criminal prosecution. The court then noted that sister states with similar immunity statutes had also refused to allow defendants to invoke the statute.

The court therefore concluded that defendant was not denied due process (the fundamental right to compulsory process). The court took pains to note that the defendant had not shown that the reluctant witness would have testified about a "material fact likely to have affected the outcome of the case." Therefore, defendant was not denied the right to offer material evidence. People v. Watkins, 259 N.W.2d 381 (1977), 14 CLB 271.

§13.275. Impeachment as to mental condition

Arizona Defendant was convicted of possession of stolen property. He appealed, contending that his right to confrontation was unduly restricted because he was not permitted to inquire into the mental history of the prosecution's key witness.

Held, affirmed. The restrictions placed on the examination of the witness did not deny to the defendant the opportunity of presenting to the jury information that would bear directly on the issues in the case or the credibility of the evidence.

The witness, Joseph Clark, had been convicted of a misdemeanor following a barroom brawl in New York about four years before the trial. At that time, Clark had allegedly been depressed over the death of his mother, and was intoxicated at the time of the incident. The New York court, as an incident of probation, ordered that Clark enter a mental hospital for diagnosis and treatment, if indicated. Clark entered the hospital but left after two days because he did not receive any evaluation or treatment. He later went to a state veteran's hospital where a one-day evaluation was made.

The Arizona Supreme Court ruled that this four-year-old occurrence could not have had any impact on the credibility of the witness, absent some indication that he continued to have mental problems. State v. Fleming, 571 P.2d 268 (1977), 14 CLB 265.

§13.330. —Recorded statements

Iowa Defendant, convicted of assault with intent to commit manslaughter, contended on appeal that the trial court should not have permitted the prosecutor to use a videotape deposition of the victim, but should have limited the people to using a stenographic report of the deposition. Held, on appeal, affirmed.

The victim confined to a hospital bed had testified simultaneously by videotape and by stenographic report. In her deposition, she described in detail what she saw and how she was shot by the defendant. She then went on to describe and point to the entry point of the bullet. The deponent had been seated in a wheelchair, wearing what was described as a cervical collar. From her shoulders, a complicated set of slings and suspensions supported what appeared to be two large armrests.

The defendant resisted the admission of the tape, arguing that videotape depositions had not yet achieved the degree of scientific accuracy necessary for admission by any court and also that the use of the videotape would be highly prejudicial. In examining the defendant's objections to the trial court's determination, the Iowa Supreme Court pointedly noted that the defendant had *not* asked the people to show that the victim was unavailable to come into the courtroom. Thus, the court ruled that the defendant could not raise this issue for the first time on appeal.

Turning to the issue of videotaped testimony, the court ruled that the tape recording was an accurate representation and then ruled that "evidence is not to be rejected merely because of its potency." State v. Jackson, 259 N.W.2d 796 (1977), 14 CLB 262.

§13.380. —Photographs

Louisiana Defendant was convicted of manslaughter. The victim had been strangled with a towel, had been beaten about the face, and had sustained a number of small puncture wounds in the throat area. His mouth had been gagged and his hands and feet tied. Cause of death was determined to be strangulation. At trial, defendant contended that he was so intoxicated that he did not have the specific intent to kill or inflict great bodily harm. To rebut this claim, the state offered three color photographs of the crime scene. They depicted the scene of the crime and the victim as he was found by the police.

On appeal, defendant argued that these pictures were gruesome in nature and that their tendency to inflame the jury and otherwise prejudice defendant outweighed their probative value. Held, on appeal, conviction affirmed. The photographs, the court ruled, tended to rebut the defendant's contention that he was too intoxicated to have the specific intent to commit the act charged. Nor were the pictures so outrageous as to necessitate a new trial. State v. Scott, 344 So. 2d 1002 (1977), 14 CLB 94.

§13.390. Res gestae and spontaneous declarations

Ohio Appellee had been convicted of gross sexual imposition with a six-year-old child, but the intermediate appellate court reversed on the ground that the victim's mother's repetition of the victim's complaint to her was hearsay and was improperly admitted at trial.

Held, on appeal to the Ohio Supreme Court, unanimously reversed, the mother's repetition of such utterances at trial was testimony as to a spontaneous declaration, and was admissible in evidence as part of the res gestae exception to the hearsay rule.

Before turning to the main issue, the Ohio High Court noted that the victim vividly described the alleged incident at the trial, and medical testimony had indicated inflammation of the child's vaginal area. The doctor had further testified that he had to administer two sedatives to the

child in order to calm her down during the medical examination.

The appellee's main claim was that because two hours had elapsed between the alleged incident and the exclamations, too much time had passed for them to be considered spontaneous. However, the court found that such statements need not be "strictly contemporaneous" with the exciting cause and may be subsequent to it, provided there has not been time for the exciting influence to lose its sway and to be dissipated. The court then ruled that, at least in the circumstances of this case, the two-hour "lapse" did not mean that the declarant was no longer under the influence of the alleged event. As the court concluded:

> "[T]he mother was the first person the victim confided in, at the earliest opportunity she had to do so. One might only speculate as to what went through the child's mind before she was found by her mother. But there is nothing in the record which would indicate that the victim engaged in reflective thought in the interim between the commission of the crime and being found by her mother, and at no time in the course of these proceedings has it been shown that the little girl would have a motive for fabricating a tale of such perversion. Furthermore, the examining physician's testimony that the victim needed sedation before her legs could be spread for examination, several hours after the incident, would seem to confirm the fact that at the time the exclamations were uttered the child was in a condition of continuing distress and anxiety."

State v. Duncan, 373 N.E.2d 1234 (1978), 14 CLB 472.

14. TRIAL

§14.90. —Exclusion of evidence

Mississippi Defendant, convicted of burglary, argued on appeal that the state was allowed to suppress evidence affecting the credibility of the prosecution's key witness in violation of Giglio v. United States, 405 U.S. 150 (1972). At the trial, defendant's attorney asked for a written statement by the state detailing all recommendations, promises, and statements made to the prosecution's key witness, defendant's accomplice. The court denied the application.

In *Giglio*, the government's key witness perjured himself in denying that he had been given any inducement to testify. The court ruled that evidence of any understanding or agreement as to a future prosecution would be relevant as to the witness' credibility, and that the jury was entitled to know of it.

The Mississippi Supreme Court held that *Giglio* was not applicable to the facts in the case at bar. The trial courts' ruling was correct. There was nothing to indicate that the witness had perjured himself. Nor was there any "newly discovered evidence" to indicate that evidence running to the witness' credibility should have been put before the trial jury. Pittman v. State, 350 So. 2d 67 (1977), 14 CLB 173.

§14.155. —Comment on failure of defense to call certain witnesses

Missouri Defendant was convicted of assault and of tampering with a motor vehicle. At the trial, the State's case indicated that two people alighted from a vehicle at night and broke into a car. They were detected by police and fled. During the course of the pursuit the police were fired upon. The brother of defendant was captured and the other person was seen to enter a car. In that car were defendant and an individual named Rosenthal. The keys to the tampered vehicle, along with the gun, were found in the vehicle.

At the trial, the tenor of the defense was that the policeman who identified defendant as the person who fled into the parked vehicle was mistaken. The brother

testified that he had committed the crime with one Anders and not with defendant or Rosenthal. The brother further testified that Rosenthal had spent much of the evening with his brother at a tavern, and was in the car at the time of the attempted escape by sheer coincidence.

The defense however did not call Rosenthal and the prosecutor commented on that lapse during summation. On appeal, defendant contended that these comments constituted reversible error. Held, affirmed.

The defendant argued that since Rosenthal was equally available to both the state and the defense, such comments at summation could not be upheld on appeal. The court rejected this argument completely: Since defendant had suggested an alibi defense, that is, that he and Rosenthal were at a tavern when the crime was committed, the relationship between them and their community of interest were such the defendant could have been expected to call him as a witness. As the court concluded: "In such case, the failure of the one party to call the witness leads logically to the inference that the witness was not called because that party knew or feared that the testimony on the stand would have damaged rather than favored the party." State v. Wilkerson, 559 S.W.2d 228 (1977), 14 CLB 370.

15. JURY

SELECTION

§15.15. Systematic exclusion of blacks, etc.

Florida Defendant, charged and convicted of first-degree murder of her husband, challenged the jury selection statute of Florida. Upon request, the statute exempts expectant mothers and mothers with children under eighteen years of age.

Held, on appeal, conviction affirmed. To evoke constitutional concern, the Florida Supreme Court wrote, the group excluded must be sufficiently "distinctive" to eliminate "the subtle interplay of influence" or "the distinct quality [which] is lost if either sex is excluded" entirely. Ballard v. United States, 329 U.S. 187, 193-194 (1946); and Taylor v. Louisiana, 419 U.S. 522 (1975).

Mothers of young children, the court then concluded, are not so distinctive a class as to evoke Sixth Amendment concerns. Those eligible for jury service include mothers of older children, women without children, and fathers with children of all ages. No distinctive quality of parenthood or sex is lost by the exclusion of mothers who presently have children under eighteen, the court ruled. McArthur v. State, 351 So. 2d 972 (1977), 14 CLB 264.

Georgia In 1962, defendant was convicted of murder. A federal court found that Brown had unlawfully been denied his right to appeal from that conviction on the ground that his appointed attorneys failed to appeal despite his wish to do so. Now, fifteen years later, Brown contended on the appeal that blacks had been systematically excluded from his grand and petit juries.

Held, conviction reversed. The evidence presented shows that the source of the jury lists was a racially identified tax digest similar to that held to be an "infected source" in Whitus v. Georgia, 385 U.S. 545 (1966).

For more than a ten-year period (preceding his 1962 trial), the jury list was no more than 5 percent black, although the community was 34 percent black; Brown's 1961 grand jury was 1.97 percent black, the petit jury pool was 1.95 percent black.

Thus, in the face of the state's claim that *Whitus* should not be given retroactive effect, the Georgia Supreme Court rejected this claim and reversed. Brown v. State, 238 S.E.2d 21 (1977), 14 CLB 265.

INSTRUCTIONS

§15.70. Burden of proof

Georgia Defendant was convicted of voluntary manslaughter. On appeal, she argued that a jury instruction concerning the use of deadly weapons, combined with a charge that the law presumes that a person intends to accomplish the natural consequences of his act was, in effect, a shifting of the burden of persuasion and proof.

Held, on appeal, affirmed. The charge in question was

> "the law presumes a person intends to accomplish the natural and probable consequences of his conduct and where a person uses a deadly weapon in a manner in which such weapons are ordinarily employed to produce death, and causes the death of a human being, the law presumes an intention to kill."

Noting that Georgia law provides that such presumptions can be rebutted by defendants, the appellate court added that the Georgia Supreme Court had recently considered similar arguments and turned them aside. (See State v. Moore, 227 S.E.2d 241 (Ga. 1975).) Washington v. State, 236 S.E.2d 837 (Ct. App. 1977), 14 CLB 174.

§15.150. Lesser included offenses

Indiana Defendant, convicted of armed robbery, argued on appeal that the trial court should have used the defendant's jury charges which included instructions on lesser included offenses.

Held, affirmed. Since there was no evidence adduced at trial to which the lesser included offense would have been applicable, it was not error for the trial court to refuse to charge the jury, as it did.

In this case, all the evidence indicated that the defendant was either guilty as charged or not guilty of any offense. The point of contention at trial was the issue of identification. The evidence showed that two men entered a liquor store and robbed it. One man took money from the cash register while the other held a gun on the victims. The defendant, Sharp, was identified as being the man who took the money from the cash register.

Thus, the court found that the trial court correctly instructed the jury on the elements of armed robbery and the elements of aiding and abetting an armed robbery. There was no need to also instruct as to lesser included offenses. The jury must have found all of the elements of the offense present beyond a reasonable doubt, and the conviction was upheld. Sharp v. State, 369 N.E.2d 408 (1977), 14 CLB 270.

17. SENTENCING AND PUNISHMENT

SENTENCING

§17.45. Standards for imposing sentence

Illinois Following a bench trial, defendant was found guilty of armed robbery, rape, battery, and kidnapping. He was sentenced to concurrent terms of not less than twenty-five nor more than fifty years for rape and armed robbery and not less than three nor more than ten years for aggravated battery. The trial court ruled that the conviction for aggravated kidnapping would merge into the rape count and had imposed no sentence for the kidnapping.

On appeal, the intermediate court affirmed the convictions, but remanded for entry of a sentence on the aggravated kidnapping conviction. Held, on defendant's petition for leave to appeal to the Illinois Supreme Court, affirmed.

The defendant argued that under Illinois Supreme Court Rule 615(b)(4), a reviewing court is expressly given the power to reduce the punishment imposed by the trial court, but not the power to increase it. The High Court, in rejecting

this reasoning, noted that the defendant's punishment is not increased merely by an order that the trial court impose sentence for a conviction for which no sentence had yet been imposed.

Defendant next argued that any sentence on the kidnapping conviction would be violative of North Carolina v. Pearce, 395 U.S. 711, wherein the Supreme Court had warned that "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." *Id.* at 725.

The court rejected this argument, too, noting that the effect of the remand to the trial court for the imposition of sentence would merely render the judgment final. Thus, since no additional sentence had been entered, the court said that any suggestion of vindictiveness must necessarily be premature. People v. Scott, 370 N.E.2d 540 (1977), 14 CLB 374.

18. APPEAL AND ERROR

§18.100. Scope of appellate review

Illinois Defendant was convicted of armed robbery and he appealed. At the trial, two prosecution witnesses gave conflicting testimony regarding identification of the accused as the robber. Each gave differing testimony regarding the height, weight, and build of the robber, and the clothing worn. The appellate court took note of this variance in testimony and reversed.

The Supreme Court of Illinois reinstated the jury verdict of guilty, ruling that the question involved was one of credibility and was for the jury to decide. When the identification of the accused is at issue, the testimony of one witness is sufficient to convict, even though such testimony is contradicted by another witness, as long as the witness making the identification is credible and he viewed the accused under circumstances permitting a positive identification. The credibility of the witnesses is for the jury to assess and the jury here obviously believed the testimony of the witness who made the positive identification. The appellate court abused its discretion in reversing the jury's guilty verdict because the evidence presented at trial was not so improbable as to raise a reasonable doubt of guilt. People v. Yarbrough, 367 N.E.2d 666 (1977), 14 CLB 168.

§18.130. Harmless error test

Illinois Defendant was charged with the murder of three prison guards during a prison riot. He was convicted of murder and he appealed. He contended that the state was "grossly negligent" failing to produce narrative-form notes of prisoner statements which were given to the state after the riot.

The appellate court affirmed defendant's conviction, holding that although the lost items were clearly subject to discovery and their loss was deplorable, this alone did not justify reversal of defendant's conviction. The record showed that the cards were preserved by the Attorney General with the same degree of care that was accorded to other materials in his possession, but they were apparently lost in a move by the Attorney General to a new building. Considering that the cards were stored for a period of approximately ten years to the date of trial, it cannot be said that the prosecutor acted in bad faith. Considering the overwhelming evidence of defendant's guilt, the loss of the items constituted only harmless error. People v. Stamps, 376 N.E.2d 543 (Ct. App. 1977), 14 CLB 168.

19. PROBATION, PAROLE, AND PARDON

PROBATION

§19.05. Revocation of probation

Texas After a guilty plea, defendant was

convicted of burglary with intent to commit theft and he appealed.

Held, the trial court which had initially deferred an adjudication of guilt and placed defendant on probation for eight years, did not err in subsequently assessing punishment at eleven years, rather than eight years, when the court later revoked probation.

The initial order deferring adjudication was entered pursuant to Texas law, which allows the court to "defer further proceedings without entering an adjudication of guilt, and place the defendant on probation." (Tex. Crim. Pro. Code Ann., Art. 42.12, § 3d(a).)

Some five months later, the state filed a motion which alleged that the defendant had violated the conditions of probation, having been charged with two aggravated robberies. After entering the guilty plea, the court heard the motion, set aside its prior order of probation, and imposed the eleven-year sentence.

The defendant's main contention on appeal was that this resentencing procedure was violative of the Supreme Court's ruling in North Carolina v. Pearce, 395 U.S. 711 (1969), wherein the Court held that due process is violated when a heavier sentence is imposed upon a reconvicted defendant, who has successfully challenged his first conviction, unless it affirmatively appears from the record that the increased sentence is based on "identifiable conduct on the part of the defendant, occurring after the time of the original sentencing proceeding." *Id.* at 726.

Pearce is inapplicable to the probation revocation proceeding at bar, the Texas court wrote, because defendant was not found guilty of burglary nor was punishment fixed for that offense when the eight-year probation term was assessed. Unlike *Pearce*, there was no retrial in this case, for defendant was only convicted once. Walker v. State, 557 S.W.2d 785 (Tex. Crim. App. 1977), 14 CLB 270.

PART III – FEDERAL CRIMES

24. NATURE AND ELEMENTS OF SPECIFIC CRIMES

§24.45. —Dispensation of controlled substances

Maine Defendant, charged with trafficking in what he knew or believed to be a scheduled drug (i.e., controlled substance), argued on appeal that the people had not proved at trial that he knew the drug to be phencyclidine, as recited in the indictment.

Held, on appeal, the people do not have to show that defendant knew *which* scheduled drug he was selling; the elements of the offense are made out when it is shown that defendant knew that he was dealing with an unlawful drug. Thus, the trial judge properly instructed the jury that the state was required to prove only that defendant knew or believed that he was trafficking in an unlawful scheduled drug and did not have to prove that defendant knew its exact identity. State v. Christianson, 383 A.2d 657 (1978), 14 CLB 469.

§24.50. —Possession

Alabama Defendant was convicted of possession of heroin and she appealed, contending that the state must show that she knowingly possessed the drugs.

Held, on appeal, reversed, and remanded. Although the statute does not use the word "knowingly," the court ruled that to pass constitutional muster, the offense cannot be made out unless the defendant's knowledge is shown.

In determining that knowledge must be an essential element in the offense, the Alabama High Court noted that a state may generally enact laws for the public health and safety, imposing strict liabilities without any element of scienter. However, the court noted that most strict liability offenses are regulatory in intent (i.e., misbranded articles, motor vehicle laws, etc.), and none have the two- to fifteen-year penalties imposed by the Controlled Substances Act.

Thus, the court ruled that the desirability of efficient enforcement of regulatory statutes must give way to the "traditional requirement that criminal sanction be imposed only for blameworthy conduct that complies with the requirements of due process of law." Walker v. State, 356 So. 2d 672 (1977), 14 CLB 468.

§24.80. —Dangerous weapon

Iowa For no apparent reason, defendant placed a starter's pistol against a woman's body and pulled the trigger. He inflicted a slight bruise and powder burn upon her body. Convicted of "going armed with intent," he was sentenced to five years in a reformatory (suspended conditionally if defendant committed himself for treatment).

Held, on appeal, reversed, the starter's pistol is not a firearm. While defendant may be chargeable with either simple or aggravated assault, the use of a starter's pistol is not the use of a firearm. The Iowa statute in question (Iowa Code Ann. § 695.1 (West)) forbids the use of a "pistol, revolver or other firearm. . . ." Before a weapon can be a pistol or a revolver, the court ruled, it has to be a firearm.

In deciding that a starter's pistol is not a dangerous or deadly instrument (also used in the statute), the court noted that a starter's pistol has a plugged barrel and cannot fire a cartridge or projectile, nor could it be modified to fire live ammunition. Looking to other states for guidance, the court noted that most courts have held that a firearm must be able to propel a projectile and must do so by explosive force. Since the pistol used in this case could not fire a projectile it was held to be not covered by the statute since it was neither a firearm nor a dangerous or deadly instrument. State v. Lawr, 263 N.W.2d 747 (1978), 14 CLB 466.

§24.100. Fraud

Court of Appeals, 7th Cir. In a civil case that may have far-reaching implications in the criminal law area, the Court of Appeals for the Seventh Circuit held that an interest in a union pension fund is a "security" for purposes of the Securities Acts of 1933 and 1934.

The suit was brought by a member of Teamster Local 705 against the union and others to recover for securities fraud as a result of alleged misrepresentations made to him concerning his rights and interests in the employer-funded pension plan.

In deciding whether plaintiff's interest in the pension fund was an investment contract, falling within the definition of a "security" for purposes of the two Acts, the court relied upon the definition set forth in the *Howey* decision:

> "An investment contract was defined by the Supreme Court in *SEC v. W. J. Howey Company*, 328 U.S. 293, 298-299, 66 S.Ct. 1100, 1103, 90 L.Ed. 27, to mean " 'a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise.' "

In applying this test to the fact before it, the court found as follows: "'The elements of the *Howey* rule are present here, for under the Local 705 Pension Fund,

money is invested in a common enterprise, the management of which is committed to a third party, and from which profits and income are reasonably expected."

The court of appeals, therefore, affirmed the district court's order denying the defendant's motion to dismiss. Daniel v. International Brotherhood of Teamsters, 561 F.2d 1223 (1977), 14 CLB 260.

§24.125. Hobbs Act

U.S. Supreme Court Respondent was convicted under the Hobbs Act, 18 U.S.C. § 1951, of attempting to obtain money from a federally insured bank by means of threats of violence to its president. The U.S. Court of Appeals for the Ninth Circuit reversed, "holding that the government had failed to prove that respondent's conduct constituted "racketeering," which, in its view, was a necessary element of a Hobbs Act offense.

In reversing, the U.S. Supreme Court relied on the plain language and legislative history of the statute, which makes it clear that Congress did not intend to limit the statute's scope by reference to an undefined category of conduct termed "racketeering," but rather that Congress intended to reach all conduct within the express terms of the statute. The Court noted that "the absence of any reference to 'racketeering' – much less any definition of the word – is strong evidence that Congress did not intend to make 'racketeering' an element of a Hobbs Act violation." United States v. Culbert, 98 S. Ct. 1112 (1978), 14 CLB 455.

Court of Appeals, 2d Cir. Defendants were convicted in district court for interference with interstate commerce by extortion. The government established that they controlled an association of mobile lunch trucks and shared in the proceeds that were extorted from the suppliers of the lunchmen. On appeal, defendants argued that the evidence was insufficient to establish an extortion under the Hobbs Act.

In affirming the convictions, the court stated that for a jury to find that an extortion took place the defendants' conduct must intentionally create in their victims a fear of economic loss if the victims failed to make a "kickback" to defendants. Fear could be inferred even if the relationship between the defendants and their victims appeared amicable. All that is needed for an extortion is "a fair inference that the victims felt that to save their business they had to keep the extortioners satisfied."

Furthermore, "the issue is not whether the defendants actually had the power to select a caterer from whom lunch truck operators would secure their supplies but rather whether the victims were in reasonable fear that the defendants possessed such power and would use it if their demands were not met." United States v. Rastelli, 551 F.2d 902 (1977), 14 CLB 159.

Court of Appeals, 5th Cir. Defendants, two union leaders, were convicted before the District Court for the Western District of Louisiana for extortion under the Hobbs Act. The charge of extortion arose out of a $5,000 payment allegedly made to defendants by a building contractor who was experiencing labor troubles at his construction site.

On appeal, defendants argued that the jury could not properly have found that an extortion took place because of the absence of any explicit threats or demand for payment. The Fifth Circuit rejected this argument however, and, in affirming the convictions, stated:

> "This court has previously affirmed convictions for extortion where the defendant claims that the evidence only shows receipt of a bribe. . . . The avoidance of explicit demands for personal payoffs and threats of adverse consequences if the payment is not made cannot in themselves save a de-

fendant from a jury determination that he intended to extort."

Fear may nonetheless be inferred. United States v. Duhon, 565 F.2d 345 (1978), 14 CLB 360.

§24.130. —Impact on interstate commerce

Court of Appeals, 2d Cir. Theodore Daley, defendant, Secretary-Treasurer of Teamster Local 445, was convicted before the District Court for the Southern District of New York of violations of the Hobbs Act and the Landrum-Griffin Act. Defendant appealed. The evidence presented by the government at trial indicated that defendant had requested that the president of Local 445 obtain for him some stone for the purpose of constructing a driveway for Daley's mountain cabin. In all, thirty to thirty-six truck loads of stone, totaling about 600 tons, were delivered by union drivers to Daley's cabin.

In affirming the judgment, the Second Circuit first addressed itself to the jurisdictional issue and found that, where two of the principal victims of the extortionate scheme were contractors working on the New York State Thruway, a major artery of interstate commerce, and where the resources of both companies were depleted by the extortion, the consequent impairment of their ability to carry on business in interstate commerce brought defendant's offense within the ambit of the Hobbs Act.

The court also found that the record established the presence of "reasonable fear" in the minds of the victims as required for a Hobbs Act conviction. "A reading of the record here reveals testimony by both employees and employers of Local 445 that they would lose their jobs or that their business would be injured if they failed to comply with Daley's requests. . . ." United States v. Daley, 564 F.2d 645 (1977), 14 CLB 366.

25. CAPACITY

§25.00. Alcoholism

Court of Appeals, 6th Cir. Defendant was convicted of uttering and publishing a United States Treasury check and with possession of the same, knowing it to be stolen from the mails. On appeal, defendant contended that he was a chronic alcoholic and that his need for alcohol was so overwhelming as to render his commission of the crime involuntary in a legal sense.

Held, on appeal, that while alcoholism and its usually attending emotional problems may be evidence of mental illness which the trier of fact can take into account in determining criminal responsibility, proof of chronic alcoholism, standing alone, is not the equivalent of proof of legal insanity. The court of appeals remanded the case to district court, however, ruling that the trial court erred in placing the burden of proof of the defense of insanity on the defendant. The burden of proof in a criminal prosecution as to all essential elements of the crime, including the insanity of the defendant, rests upon the prosecution. United States v. Carr, 550 F.2d 1058 (1977), 14 CLB 87.

§25.05. Amnesia

Pennsylvania Defendant, convicted of murder, argued on appeal that he was denied a fair trial because amnesia prevented him from recalling anything about the incident.

Held, on appeal, affirmed. The inability to recall a criminal act does not deny the accused either the effective assistance of counsel or the opportunity to present a defense. The court wrote that at the time of trial, defendant was fully recovered from his wounds and was completely competent. The amnesiac, the court noted, is no worse off than any defendant who alleges that at the time of the crime he was insane, or very intox-

icated, or completely drugged, or a defendant whose mind went blank, or who panicked, and contends or testifies that he does not remember anything. Commonwealth v. Barky, 383 A.2d 526 (1978), 14 CLB 468.

27. DEFENSES

§27.00. Alibi

Court of Appeals, D.C. Cir. On appeal from his conviction for armed robbery, defendant asserted errors in the trial court's instructions relating to the burden of proof as to an alibi defense. In its charge to the jury, the trial court directed the jury "to analyze the testimony presented by [the defendant] and his witnesses in contradistinction to the testimony presented by the government. . . ."

In reversing the conviction, the court of appeals agreed with the defendant's contention that such a charge improperly shifted the burden of proof to the defendant. While the court instructed the jury that the government must prove every element, it failed to add that each element must be proven beyond a reasonable doubt, including the element that the defendant took the property from the victim. Since the defendant obviously could not have taken the property if he was not at the crime scene, the burden rested with the government to disprove the alibi defense by proving that defendant was present.

Since the case was basically a swearing contest between the government's identification witness and the defendant, the alibi issue was critical. The failure to give a proper charge was *not* harmless error. United States v. Alston, 551 F.2d 315 (1976), 14 CLB 158.

§27.15. Entrapment

Colorado Defendant was convicted of selling a narcotic drug with intent to aid or induce another to unlawfully use or possess it and of conspiracy to sell narcotic drugs. On appeal, defendant contended that he did not "induce or aid others" since the police agents initiated and solicited the narcotics sale.

Held, conviction affirmed. The facts involving the "sale" arose as follows: An agent, disguised as an organized-crime figure, entered defendant's shop and indicated that he was a user of illegal drugs, desired to obtain cocaine, and suggested that he might be interested in investing in defendant's store (which specialized in selling pipes, spoons, roach clips, etc.). Defendant evidenced a familiarity with the use of cocaine and stated that he could supply good quality drugs. During several subsequent meetings, defendant portrayed himself as the head of a South American drug organization. At the agent's request, an employee of defendant sold the agent an ounce of cocaine and the defendant continually promised to set up a $10,000 cocaine deal.

From this course of conduct, the court concluded that, although the police may have initiated and solicited the sale, defendant's representations to the agent establish that he was, in fact, an illicit drug merchant. Further, he expressly sought to increase and broaden his illegal market by soliciting future sales to the agent. Mundt v. State, 576 P.2d 165 (1978), 14 CLB 465.

§27.50. Statute of limitations

Court of Appeals, D.C. Cir. In a case growing out of the Watergate investigation, defendant, a former vice-president of Gulf Oil Co., was informed by the special prosecutor that an indictment would be returned against him for violations of the campaign contributions law. Defendant entered into plea negotiations with the government. Since the statute of limitation was due to expire, however, defendant, at his attorney's suggestion, executed and delivered a written waiver. An indictment was ultimately handed

down against defendant, despite the negotiations, but the district court dismissed one of the counts as being barred by the statute of limitations.

The court of appeals reversed and remanded.

Noting that the issue was one of first impression, the court ruled that since the statute of limitations is an affirmative defense, rather than a jurisdictional bar to prosecution, it is waivable. In the case at bar, the court found the waiver since defendant's attorney had negotiated an express written waiver. Consequently, the government refrained from indicting before the statute ran out only after the active intercession of the defense attorney. United States v. Wild, 551 F.2d 418 (1977), 14 CLB 160.

PART IV – FEDERAL PROCEDURES

29. PRELIMINARY PROCEEDINGS

§29.00. Grand jury proceedings

Court of Appeals, 5th Cir. Defendant was found in civil contempt by the District Court for the Northern District of Georgia for her refusal to submit handwriting exemplars to the grand jury. Although not by affidavit, the government did advise the court that McLean was a potential defendant and that its sole purpose in requesting the samples was to make legitimate investigative comparisons with documents that may contain her handwriting.

On appeal to the Third Circuit, defendant argued that the Fifth Circuit should adopt the Third Circuit view articulated in *In re* Grand Jury Proceedings, 486 F.2d 85 (3d Cir. 1973) (*Schofield* I), and *In re* Grand Jury Proceedings, 507 F.2d 963 (3d Cir. 1975) (*Schofield* II), where the court stated that "we think it reasonable that the Government be required to make some preliminary showing by affidavit that each item is at least relevant to an investigation being conducted by the grand jury and properly within its jurisdiction, and is not sought primarily for another purpose."

In affirming the finding of contempt, the Fifth Circuit decided not to follow the Third Circuit precedence, reasoning as follows:

> "The Third Circuit made it clear that the guidelines it set were to be the law in that circuit and not required by the Constitution or the Supreme Court. We are not prepared to make such the law in the Fifth. As noted by the Supreme Court: 'Any holding that would saddle a grand jury with mini-trials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws.' *United States v. Dionisio*, 410 U.S. 1, 17, 93 S.Ct. 764, 773 (1973)."

United States v. McLean, 565 F.2d 318 (1977), 14 CLB 361.

Court of Appeals, 6th Cir. On his appeal from a conviction of perjury, defendant argued that it was improper for the prosecutor to have called him before a grand jury after he had been secretly indicted and to question him without counsel present and without his being informed of the nature and cause of the accusation for which he stood already accused.

In reversing the conviction, the court of appeals unleashed a scathing condemnation of such prosecutorial practices:

> "The tremendous advantages which the prosecution could gain by subjecting an indicted defendant to such a private

inquisition just before trial would make a fundamental change in the American constitutional system of adversarial trial as set forth in the Fifth and Sixth Amendments. Nor could such abuse be cured by the trial court's sustaining objections to grand jury evidence thus procured. As indicated above, the knowledge gained by the prosecutor from the defendant's own mouth as to sensitive areas and potential witnesses would be invaluable to him even if the prosecutor never tendered a line of grand jury testimony for admission at the subsequent trial."

United States v. Doss, 563 F.2d 265 (1977), 14 CLB 255.

§29.15. Arrest

Court of Appeals, 2d Cir. Defendant was charged with conspiracy to import narcotics. The trial court granted defendant's motion to suppress, holding that there was no probable cause to arrest defendant because the only incriminating facts came from an informant whose reliability was previously untested. The informant was a participant in and a witness to the crime.

In reversing the district court, the Second Circuit held that the agents properly relied on the informant's information in establishing probable cause for defendant's arrest. The court held that there was no need to show past reliability where the informant participated in the crime at issue. Requiring a showing of prior reliability would render unavailable the information that the informant was uniquely situated to supply. United States v. Rueda, 549 F.2d 865 (1977), 14 CLB 89.

31. PRETRIAL MOTIONS

§31.05. —Procedure for dismissing indictment

Court of Appeals, 2d Cir. Defendants were convicted in the district court of intimidating persons from occupying dwellings in violation of the Fair Housing Law and of making false declarations. On appeal, the court of appeals affirmed on the false declaration counts but reversed on the Fair Housing counts, holding that the defendants must be given the benefit of the rule established in United States v. Hinton, 543 F.2d 1002 (2d Cir. 1976).

In *Hinton*, the court held that an indictment, by the same grand jury that heard immunized testimony of a defendant, must be dismissed. The government tried to distinguish *Hinton* by arguing that, in the case at bar, the defendants failed to move to dismiss the indictment before trial pursuant to Rule 12 of the Rules of Criminal Procedure. The court, however, found this contention unpersuasive since the issue was raised before the trial judge before trial in the form of a motion for severance as well as a motion to preclude, so the defect would have been curable by a proper reindictment. United States v. Anzalone, 560 F.2d 492 (1977), 14 CLB 254.

32. DISCOVERY

§32.05. —Statements of defendant

Court of Appeals, 5th Cir. Defendant was convicted before the District Court for the Northern District of Georgia of interstate transportation of a stolen motor vehicle. On appeal to the Fifth Circuit, the defendant argued that the government had violated his rights under *Brady* and the Jencks Act by failing to produce the interview notes of a testifying FBI agent. The notes had been destroyed after the FBI 302 report had been prepared.

While noting that the Ninth Circuit requires that such interview notes be maintained, the Fifth Circuit affirmed the conviction and decided to follow the majority view:

"Where such notes have been destroyed by an FBI agent in good faith, following customary agency procedure, and the interview report prepared therefrom is given to the defendant, this Circuit has ruled that there is no Jencks Act violation. Nothing in the Jencks Act requires that notes made in the course of an investigation be preserved after the notes have served their purpose of assisting in the preparation of interview reports."

The court also concluded that, absent some independent showing that FBI notes contain evidence that is material to guilt or punishment, they do not constitute *Brady* material. United States v. Martin, 565 F.2d 362 (1978), 14 CLB 369.

§32.10. —Statements of witnesses

Court of Appeals, 6th Cir. Defendant was convicted of aiding and abetting in the unlawful entry of a bank. On appeal, he claimed that prejudicial error occurred when the trial judge denied his motion to inspect all of the "reports" of an FBI agent who was a witness in the case.

In affirming the district court, the court of appeals interpreted the Jencks Act, 18 U.S.C. § 3500, as requiring the production of any "statement" of a witness whose direct testimony is presented in a criminal trial, where the statement had been previously recorded and approved or adopted by the witness.

Defendant did not dispute that the government had finished the "statement" about which the FBI agent testified. What defendant did not get, however, were the agent's case reports which defendant claimed were required to be produced for screening as to possible relevancy to the agent's direct testimony. In short, defendant claimed that anything committed to writing by the agent was discoverable.

The court rejected defendant's contention that the Jencks Act provided for such broad discovery. In fact, "the purpose of the Jencks Act itself was to restrict a defendant's right to any general exploration of the government's files." United States v. Nickell, 552 F.2d 684 (1977), 14 CLB 156.

§32.20. Identity of informants

Court of Appeals, 2d Cir. In a suit brought by the Socialist Workers' Party against the FBI for injunctive relief and damages, a District Court judge for the Southern District of New York directed the FBI to produce certain informers' files for *in camera* inspection by plaintiffs' attorneys, and a petition for mandamus was filed by the government directed against the order.

In denying the mandamus application, the court of appeals emphasized that a heavy burden of proof lies with the party seeking disclosure of an informant's identity:

"The burden of establishing the need for disclosure is upon the person who seeks it. . . . This burden is not met by mere speculation that identification might possibly be of some assistance. . . . Disclosure should not be directed simply to permit a fishing expedition, . . . or to gratify the moving party's curiosity or vengeance, . . . but only after the trial court has made a determination that plaintiff's need for the information outweighs the defendant's claim of privilege." [Citations omitted.]

The court concluded, however, that the order in this case was not an abuse of discretion:

"However, it is by now well-established that a district judge, in the exercise of his discretion, may permit opposing counsel to participate in and assist him in the conduct of *in camera* proceedings under a pledge of secrecy. . . . The order appealed from does not therefore create an issue of first impression or

extraordinary significance, nor was its issuance an abuse of discretion which warrants appellate review." [Citations omitted.]

Appeal dismissed and application for writ of mandamus denied. *In re* United States, 565 F.2d 19 (1977), 14 CLB 359.

33. GUILTY PLEAS

§33.25. —Duty to advise defendant of consequences of plea

Court of Appeals, 7th Cir. Defendant pleaded guilty to the crime of armed violence (in an Illinois court) in return for the prosecutor's promise of a sentence of one to two years which was ratified by the judge. Defendant was not informed, however, that the state statute required that a sentence for armed violence be followed by a mandatory parole term of two years.

In his habeas corpus petition, defendant argued that his guilty plea was involuntary, since he did not know of the mandatory parole term, in violation of the due process clause of the Fourteenth Amendment. The court agreed, rejecting the state's argument that the burden was on defendant to show that he would have rejected the plea offer if he had known of the mandatory parole term.

The court held that the two-year mandatory parole term constituted a significant addition to the prison term. Accordingly, defendant's writ of habeas corpus was granted. United States v. Finkbeiner, 551 F.2d 180 (1977), 14 CLB 162.

§33.50. Motion to withdraw guilty plea

Court of Appeals, 4th Cir. Defendant was convicted in the District Court for the Eastern District of Virginia for operating a numbers game in violation of 18 U.S.C. § 1955. On appeal, defendant asserted that the trial court's refusal to consider a plea agreement, including a sentence recommendation by the attorney for the government, constituted an abuse of discretion which would permit the defendant to withdraw his guilty plea.

In affirming the conviction, the court of appeals relied on the statutory history of Rule 11 of the Federal Rules of Criminal Procedure to support its position that the trial judge had the discretion to disregard the plea agreement:

> "Subdivision (e) of Rule 11 spells out the guidelines to be observed by the court and counsel in plea agreement procedures, but the Rule leaves to the court the option of whether it will accept or reject the plea agreement. While the Rule is silent with respect to the authority of the court to decline to countenance any plea bargaining whatever, such a prerogative was recognized by the Congress in its consideration of the Federal Rules of Criminal Procedure Act of 1975, P.L. 94-64, 89 Stat. 370. The proposed subdivision (e) had been criticized by some federal judges who read it to mean that consideration of plea agreements was mandatory. However, in their testimony before the Congressional committee, the members of the Advisory Committee on Criminal Rules stressed that the Rule does not require that a court permit any form of plea agreement to be presented to it."

United States v. Jackson, 563 F.2d 1145 (1977), 14 CLB 362.

34. EVIDENCE

ADMISSIBILITY AND WITNESSES

§34.20. Variance between pleading and proof

Court of Appeals, 2d Cir. Defendants were charged with conducting and conspiring to conduct an illegal gambling business. At the close of the government's

case, the trial judge dismissed the conspiracy count on the ground that there was a variance between the government's theory and its proof in that instead of there being one conspiracy, the evidence indicated the existence of multiple conspiracies.

On appeal, defendants argued that the evidence admitted solely in support of the conspiracy count had a "spillover effect" on the remaining substantive count. The reviewing court ruled, however, that defendants could only succeed with this argument if they could show evidence of bad faith on the part of the government in bringing the conspiracy charge, or if they could show prejudice.

When it analyzed the record, the reviewing court found that the charge was brought in good faith since the government had good reason to believe that the evidence would support the conspiracy count (one of the government witnesses apparently refused to testify at the last minute). As there was only limited testimony admissible solely for purposes of the conspiracy count, no prejudice was found. United States v. Variano, 550 F.2d 1330 (1977), 14 CLB 165.

§34.60. Circumstantial evidence

Court of Appeals, 8th Cir. Defendant was convicted of bank robbery. After admitting evidence of defendant's indigence prior to the robbery, the trial court admitted evidence that three days after the robbery defendant had a shoe box full of money in his possession, and that within the next two weeks he had spent approximately $1,000 on a vacation and $2,500 on a car. On appeal, defendant contended that the trial court erred in admitting evidence with respect to his financial status immediately before and after the bank robbery.

Held, in affirming defendant's conviction, that "unexplained evidence of wealth, subsequent to the commission of a crime, is relevant and generally admissible at the discretion of the trial court, especially when there has been a showing that prior to the crime he had been impecunious." United States v. Pensinger, 549 F.2d 1150 (1977), 14 CLB 87.

§34.150. Privileged communications

Court of Appeals, 7th Cir. An investigation of the petitioner-corporation was conducted to determine whether the corporation and/or any of its officers and attorneys withheld certain information from the Environmental Protection Agency. The investigation particularly focused on whether a legal memorandum submitted in the administrative proceeding contained false representations concerning the presence or absence of certain reports in the corporate files. In response to a grand jury subpoena for certain memorandum prepared by the law firm, the corporation asserted the attorney-client privilege and the work-product rule. The district court granted the government's motion to compel production of the documents and the corporation appealed.

In affirming the lower court, the court of appeals noted that the instant case involved a criminal grand jury investigation into documents prepared in earlier administrative proceedings. The documents prepared by the seller's firm were not prepared in anticipation of a potential criminal litigation. Moreover, the focus of inquiry was to determine if their preparation was attended by misconduct. Under these circumstances, the court found that the government had shown adequate grounds to acquire the documents.

The court also relied on a restrictive interpretation of the relevant rule: "Neither does the language of Rule 16(b)(2) warrant so broad a reading. We believe that 'the case' mentioned in Rule 16(b)(2) should be confined to the instant criminal investigation and not extended to documents prepared by a different law firm in prior administrative proceedings." Vel-

sicol Chem. Corp. v. Parsons, 561 F.2d 671 (1977), 14 CLB 456.

Court of Appeals, 8th Cir. In litigation arising from the Wounded Knee incident, an attorney's motion to quash a grand jury subpoena served on him was granted on the condition that he answer written interrogatories submitted by the government or appear in open court for questioning. The grand jury was investigating the possibility that the attorney's client had willfully failed to appear at trial.

The court of appeals affirmed, denying petitioner's claim of attorney-client privilege and the argument that the government must show a compelling need for specific information asked of the attorney:

> "Communications by a defense counsel to the client or a client to the defense counsel regarding the time and place of trial are not confidential and therefore are not protected by the attorney-client privilege. *United States v. Freeman*, 519 F.2d 67, 68-69 (9th Cir. 1975); *United States v. Bourassa*, 411 F.2d 69, 74 (10th Cir.), *cert. denied*, 396 U.S. 915, 90 S.Ct. 235, 24 L.Ed.2d 192 (1969)."

In re Grand Jury Proceedings, 568 F.2d 555 (1977), 14 CLB 460.

§34.225. —Impeachment by prior conviction

Court of Appeals, D.C. Cir. Defendants were convicted of armed bank robbery and armed robbery. One of the defendants sought appellate review of the trial court's ruling that evidence of a prior conviction for armed robbery would be admissible for impeachment purposes if he took the stand in his own defense.

The court first determined that the issue was governed by the recently enacted Federal Rules of Evidence 609(a), even though at trial all parties appeared to rely on prior case law. The court outlined three significant changes made by the rule: (1) Evidence of prior convictions for crimes involving dishonesty or false statement is now automatically admissible, rather than at the discretion of the trial court; (2) the rule regulates impeachment by prior convictions only where the defendant's interests may suffer by the admission, and not where the government's case may be damaged by impeachment of one of its witnesses; (3) for crimes not involving dishonesty or false statement, the government now bears the burden of showing that the probative value of the evidence outweighs its prejudicial effect.

In applying the new standard, the court held that armed robbery is not a crime involving dishonesty or false statement and that the trial court's application of the old rule constituted reversible error. United States v. Smith, 551 F.2d 348 (1976), 14 CLB 157.

Court of Appeals, 10th Cir. Defendant was convicted on six counts of second-degree burglary, and he appealed on the ground that it was reversible error for the trial judge to have permitted his credibility to be attacked on cross-examination by interrogation concerning prior burglary conviction.

The court of appeals affirmed the conviction, but it held that "the prior convictions of burglary offered as impeaching evidence in this case were not automatically admissible under Rule 609(a)(2)" since burglary is not a crime involving "dishonesty and false statement."

The court found, however, that the trial court's ruling was not clearly erroneous since it had weighed the probative value of such evidence against the prejudice to the defendant. United States v. Seamster, 568 F.2d 188 (1978), 14 CLB 462.

§34.270. —"Opening the door" through cross-examination

Court of Appeals, 5th Cir. Defendant was convicted in district court of conspiring

and aiding and abetting the interstate transportation of forged securities. Testifying on his own behalf at trial, the defendant stated that he had refused a plea bargain offer because he was innocent. On cross-examination by the government, he was asked about a counter-offer he had made the prosecutor and, over the objection of defense counsel, defendant said he had requested probation and offered to repay the money that the bank had lost.

On appeal to the Fifth Circuit, the court noted that "evidence of a withdrawn guilty plea, an offer to plead guilty, and statements made in connection with plea negotiations are completely inadmissible at trial under Rule 11(e)(6)."

The court decided, however, that no reversible error occurred because the facts of the case indicated that the prosecutor's conduct fell within the "invited error" exception to the general rule:

> "The accepted rule is that where the injection of allegedly inadmissible evidence is attributable to the action of the defense, its introduction does not constitute reversible error. *United States v. Taylor*, 508 F.2d 761, 763-764 (5th Cir. 1975). The Government could cross-examine the defendant on his direct testimony about the plea negotiations. Defendant was allowed to explain his plea offer, his explanation was consistent with his defense of innocence, and the judge gave a cautionary instruction to the jury."

United States v. Doran, 564 F.2d 1176 (1977), 14 CLB 357.

§34.295. —Declarations of co-conspirators

Court of Appeals, 2d Cir. Defendant was convicted in district court of counterfeiting, but at the end of the prosecution's case, the court dismissed the conspiracy count against the defendants. On appeal, defendant argued that, in view of the dismissal of the conspiracy count, it was error for the court to allow the jury to consider the statements of a co-defendant, which he contended were inadmissible on hearsay grounds.

The court of appeals rejected defendant's argument, holding that under United States v. Geaney, 417 F.2d 1116 (2d Cir. 1969), *cert. denied sub. nom* Lynch v. United States, 397 U.S. 1028 (1970), declarations of a co-conspirator are properly admitted when the judge determines, after all the evidence is in, that "the prosecution has proved participation in the conspirary by the defendant against whom the hearsay is offered, by a fair preponderance of the evidence independent of the hearsay utterances."

In applying this test, the court found that a dismissal of the conspiracy count does not automatically mandate a ruling that the declarations were inadmissible to the substantive counts. In deciding whether a conspiracy count should be admitted to the jury, a court should apply the standard articulated in Curley v. United States, 160 F.2d 229, *cert. denied* 331 U.S. 837 (1947), which is, "whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt."

A judge, therefore, may properly find that the evidence, including hearsay declarations, does not warrant submission of a conspiracy count to a jury, but does meet the *Geaney* test for the admission of a declaration as to a substantive court. United States v. Stanchich, 550 F.2d 1294 (1977), 14 CLB 161.

WEIGHT AND SUFFICIENCY

§34.340. Sufficiency of evidence

Court of Appeals, 2d Cir. In a case stemming from the notorious "Rio Rancho" land fraud scheme, appeals were

taken from judgments convicting defendants on 20 counts of mail fraud and five counts of interstate land-sale fraud.

In affirming the convictions, the court of appeals rejected the defendants' contention that, in proving a scheme to defraud by means of several misrepresentations, every misrepresentation charged in the indictment must be proven and the failure to prove one must result in a retrial. "'[Appellants] confuse the scheme to defraud, which is the gist of the offense, with the means adopted to effectuate that scheme.' A scheme to defraud may consist of numerous elements, no particular one of which need be proved if there is sufficient overall proof that the scheme exists." [Citations omitted.]

The court distinguished its prior holding in United States v. Natelli, 527 F.2d 311 (2d Cir. 1975), *cert. denied* 425 U.S. 934 (1976), as follows:

> "In that case, the defendant was charged in a single count with violating the securities law by making false statements in a proxy statement. Because the crime charged consisted of the making of such statements, the erroneous failure of the trial court to direct a verdict as to one of the alleged falsities, arising out of a separate state of facts, made the jury's general verdict ambiguous and required a new trial. Here, the crime charged was the scheme to defraud, and the alleged false statements were merely means for carrying it into effect."

United States v. Amrep Corp., 560 F.2d 539 (1977), 14 CLB 260.

35. THE TRIAL

§35.80. —Disclosure of co-defendant's guilty plea

Court of Appeals, 5th Cir. Defendants were convicted in the District Court for the Southern District of Texas of conspiracy to distribute heroin and possessing heroin with the intent to distribute. On appeal, defendants alleged error by the trial court in having allowed co-defendant, whose case had been severed, to testify, over the objection of defendants, that in an earlier trial of her, upon the identical indictment, she had been convicted by a jury.

Reversing the conviction, the court of appeals agreed with defendants' contention that the real purpose in calling co-defendant to the stand was to inform the jury that another jury had found the witness guilty of the same offense for which defendants were charged. Such conduct constitutes reversible error:

> "It was gravely prejudicial to advise a jury that a person indicted as a co-defendant had been found guilty. There were no special circumstances which made such prejudicial testimony admissible. . . . On the contrary, it seems to us plain that the testimony of Mary Rangel Rodriguez added nothing of probative value and was a calculated tactic of the prosecution to place before the jury wholly inadmissible testimony." [Citations omitted.]

United States v. Aldaco, 564 F.2d 706 (1977), 14 CLB 365.

§35.90. —Restrictions on right of cross-examination

Illinois Defendant, convicted of armed robbery, argued on appeal that he should have been permitted to take the stand to rebut a specific point in the people's case without being subjected to full cross-examination.

Held, on appeal, affirmed. Defendant may not choose to take the stand in a limited capacity. One of the victims of the robbery had testified that one of the two persons who robbed him was dressed in a black-and-white striped shirt. The defendant's motion *in limine* was that he be allowed to take the stand and rebut this

testimony by stating that when arrested he was wearing a pink shirt. A police officer who stopped the getaway car and arrested two of the three occupants also testified that the third occupant who escaped the car and arrest was wearing a black-and-white striped shirt.

The appellate court concluded that while it may be proper for the trial court to limit the cross-examination of a defendant who chooses to testify, the limitations that defendant sought here were properly denied, since the defense counsel wanted the trial court to order the prosecutor to limit his cross-examination only to what clothing the defendant was wearing when arrested. People v. Dawson, 373 N.E.2d 632 (Ct. App. 1978), 14 CLB 470.

Michigan Defendant, convicted of embezzlement and arson, contended on appeal that the court committed reversible error when it permitted the prosecutor to cross-examine him regarding his poor financial condition at the time of the offense and instructed the jury that it might consider this evidence as bearing on defendant's motive.

Held, on appeal, reversed. Although the court noted that a defendant's financial status may sometimes become important to show lack of a motive, the wealth of a defendant should not be offered by the people to raise the inference that a poor defendant would be more tempted to do the act charged. The court noted, however, that where the defendant takes the stand to establish that, because of his financial position, he would have no need to do the act charged, the people should have the latitude to cross-examine him on his financial status.

In routine theft cases, the court wrote, it would be unfair for the people to routinely show that the defendant's poverty impelled the crime charged. As the court concluded, greed is less easy to establish than poverty. Therefore, if proof of poverty is permitted on a routine basis, it will further disadvantage those least able to defend themselves in the court. People v. Henderson, 264 N.W.2d 22 (Ct. App. 1978), 14 CLB 463.

§35.115. —Comments made during summation

Massachusetts Defendant, charged with first-degree murder, admitted killing the victim but claimed criminal irresponsibility. At his trial, he produced two expert witnesses – a psychiatrist and a psychologist – who testified that on the night of the killing, defendant suffered from a "dissociative reaction" which was caused by his underlying (paranoid) personality structure, and which resulted from a "homosexual panic."

The expert witness produced by the Commonwealth of Massachusetts agreed with the opinions that defendant had a paranoid personality, and that, on the night of the killing, had suffered a dissociative reaction resulting from homosexual panic. The state's expert concluded, however, that the dissociative reaction was caused in part by the consumption of alcohol. At summation, the prosecutor urged the jury to discount the testimony offered by the experts produced by defendant, and now, on appeal from his conviction, defendant argued that the prosecutor's remarks were so prejudicial in nature as to require reversal.

Held, on appeal, reversed. The Massachusetts High Court found that the prosecutor impermissibly urged the jury to disregard the testimony of defendant's experts because these witnesses had been "bought." The court noted that this language might, in any other case, be deemed harmless error, "neutralized" by the curative instruction that statements of counsel are not evidence. But here, where defendant admitted the crime and sought to offer his mental state as his only defense, the prosecutor's comments were directed to the heart of the jury's ability to

return a verdict based on the evidence, and were designed to play on the prejudices of the jury. Therefore, the prosecutor's remarks could not be cured by the trial court's instruction that statements of counsel are not evidence, and reversal was consequently required. Commonwealth v. Shelley, 373 N.E.2d 951 (1978), 14 CLB 467.

§35.125. —Comments on defendant's silence while in custody

Minnesota Defendant, charged with robbery, testified at trial that he was in the company of his fiancee when the incident occurred. She corroborated this story. On cross-examination, the prosecutor was permitted to ask defendant why he had waited until the trial to "announce" his alibi defense. (When this case arose, Minnesota did not have a "notice of alibi" statute.")

On appeal, defendant contended that the prosecutor's line of cross-examination violated his due process since it called into question his failure to make any post-arrest statements. Citing Doyle v. United States, 426 U.S. 610 (1976), the Minnesota Supreme Court ruled that the prosecutor's reference to the defendant's earlier silence was error requiring reversal.

In *Doyle*, the Minnesota court noted, the prosecutor was precluded from impeaching the defendants' exculpatory explanations by asking them on cross-examination why they had not told the police their version of the incident after receiving *Miranda* warnings at their arrest. State v. Billups, 264 N.W.2d 137 (1978), 14 CLB 466.

§35.150. —Suppression of evidence

Court of Appeals, 9th Cir. The defendants appealed from an order denying their motions for a new trial under Rule 33, contending that the failure of the government or its chief witness to disclose a promise that charges against him would be dismissed if he testified favorably for the prosecution was ground for a new trial.

The Ninth Circuit reversed, observing that the evidence raised serious questions as to the witness's veracity at the original trial where he testified that he had been given no promises of assistance in return for his testimony.

The court further found that the trial court had applied an improper standard when it stated that a new trial would be required only if the nondisclosure could reasonably have affected the judgment of the jury to the point of changing its verdict: "The proper standard in negligent nondisclosure cases should call for a new trial wherever the nondisclosed evidence might reasonably have affected the jury's judgment on some material point, without necessarily requiring a supplementary finding that it also would have changed its verdict." United States v. Butler, 567 F.2d 885 (1978), 14 CLB 458.

Louisiana Defendant, appealing a conviction for armed robbery, contended that the people's failure to reveal that two of the state's eyewitnesses had made mistaken identifications on the day after the robbery constituted reversible error.

Held, on appeal, reversed for new trial. From a muddled record, the Louisiana Supreme Court was able to discern that although no formal *Brady* motion had been made, the prosecutor was apparently aware of the initial misidentifications. The defense lawyer had apparently asked the prosecutor whether any identifications had been made and had been informed that there was no such evidence and, because of this, had not made a formal motion.

The court therefore ruled that the prosecution should have disclosed the identification information prior to trial.

In determining whether the evidence withheld was material, requiring reversal, the court cited United States v. Agurs, 96 S. Ct. 2392, 2401, (1976). Therein the Court stated that

"if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is not justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a more reasonable doubt."

Applying the rule of *Agurs* to the instant case, the court found reversible error. Three persons were involved in the bank robbery; five witnesses observed the incident and two of them misidentified one of the suspects. The other three eyewitnesses had other "weaknesses and uncertainties," the court noted. At least four of the witnesses could be open to doubt, the court concluded, and upon such a showing, the people's failure to disclose the earlier misidentifications was clearly material in that the omitted evidence created a reasonable doubt that did not otherwise exist. State v. Falkins, 356 So. 2d 415 (1978), 14 CLB 463.

36. THE JURY

SELECTION

§36.35. Challenges for cause

New Jersey Defendant, convicted of armed robbery, challenged the trial court's refusal to excuse a juror for cause, who, on voir dire, stated that he was the victim of an armed robbery seventeen days before the trial.

Held, on appeal, reversed, the court's refusal to excuse such a juror was prejudice per se and mandated reversal, even though defendant then exercised a peremptory challenge to have the juror excused. The appellate panel noted that, because defendant's challenge for cause was turned aside, and he had to resort to a peremptory challenge, his allotment of peremptory challenges was exhausted before the full panel was chosen.

Further, the court noted that the failure to excuse for cause was required even though the prospective juror professed his ability to sit as a fair and impartial juror in the case. State v. Singletary, 383 A.2d 1151 (N.J. Super. 1978), 14 CLB 473.

Pennsylvania Defendant, convicted of murder, conspiracy, armed robbery, and assault, contended on appeal that it was fundamental error for the trial judge to "force" him to use a peremptory challenge on a prospective juror who should have been excused for cause. Because defendant exercised one of his peremptory challenges, he exhausted them before the full jury was chosen.

Held, on appeal, reversed for new trial. The challenged venireman was a Philadelphia policeman, and all of the police who testified in the case were Philadelphia officers. Although Jones never took the stand, the focus of his defense was the alleged involuntary nature of the confession. From this record, the Pennsylvania Supreme Court ruled that there existed a "real relationship" between the proposed juror and the case, and while the mere status of being a peace officer does not always mandate removal for cause, in this case such a removal was required. Commonwealth v. Jones, 33 A.2d 874 (1978), 14 CLB 474.

INSTRUCTIONS

§36.65. —Defendant's failure to testify

U.S. Supreme Court After the defendant did not take the witness stand at his trial for escape in Oregon state court, the trial judge, over the objection of the defendant, instructed the jury not to draw any adverse inference from the defendant's decision not to testify. The conviction was reversed by the Oregon Court of Appeals

but was subsequently reinstated by the Oregon Supreme Court.

In affirming, the U.S. Supreme Court decided that the giving by the trial judge of the cautionary instruction over the defendant's objection did not violate the Fifth Amendment privilege against self-incrimination, nor did it deprive the defendant of his Sixth Amendment right to counsel by interfering with his attorney's trial strategy.

The Court distinguished the instant case from Griffin v. California, 380 U.S. 609, where the Court found it constitutionally objectionable for the prosecutor to encourage the jury to draw adverse inferences from the defendant's failure to respond to the case against him. In this case, on the other hand, the judge's instruction that the jury must draw *no* adverse inferences "cannot provide the pressure on a defendant found impermissible in Griffin." Lakeside v. Oregon, 98 S. Ct. 1091 (1978), 14 CLB 454.

§36.100. Duty to charge on essential elements of crime

U.S. Supreme Court Defendant and an accomplice robbed an intoxicated man during a winter night and left him on a highway, where he was killed by a speeding truck. The defendant and his accomplice were subsequently convicted in a New York trial court of grand larceny, robbery, and second-degree murder.

The conviction was upheld by the New York Court of Appeals, which rejected the argument that the truck driver's conduct constituted an intervening cause that relieved the defendants of criminal liability for the victim's death. Defendant then filed a habeas corpus petition in federal district court, which refused to review, holding that defendant's challenge to the sufficiency of the charge failed to raise an issue of constitutional dimension. The Second Circuit reversed, holding that the trial court's failure to instruct the jury on the essential element of causation created a risk that defendant had not been found guilty beyond a reasonable doubt.

The Supreme Court reversed. Although there was no specific instruction given as to the issue of causation, both counsel stressed the issue, and the statutory language, which the judge read to the jury, expressly referred to the requirement that defendant's conduct cause the death of another person. By returning a guilty verdict the jury necessarily found that causation existed. Henderson v. Kibbe, 97 S. Ct. 1730 (1977), 14 CLB 85.

§36.120. Lesser included offenses

Court of Appeals, 8th Cir. Defendant was convicted of taking a package from a mail depository with intent to open, secrete, and embezzle. On appeal, defendant contended that the trial court erred in denying his request for an instruction on the lesser included offense of general obstruction of the mails.

Held, in affirming the conviction, that defendant was not entitled to the instruction. As the court previously noted in United States v. Thomson, 492 F.2d 359, 362 (8th Cir. 1974):

> "A defendant is entitled to an instruction on a lesser included offense if: (1) a proper request is made; (2) the elements of the lesser offense are identical to part of the elements of the greater offense; (3) there is some evidence which would justify conviction of the lesser offense; (4) the proof on the element or elements differentiating the two crimes is sufficiently in dispute so that the jury may consistently find the defendant innocent of the greater and guilty of the lesser included offense; and (5) there is mutuality, i.e., a charge may be demanded by either the prosecution or defense."

The purpose of the fourth requirement, said the court, is to prevent the jury from capriciously convicting on the lesser offense when the evidence requires either conviction or outright acquittal. The

court held that in this case the requirement had not been met because the jury could not consistently find defendant guilty of the lesser crime and innocent of the greater crime. United States v. Brown, 551 F.2d 236 (1977), 14 CLB 161.

37. POST-TRIAL MOTIONS

§37.45. Federal habeas corpus

Court of Appeals, 9th Cir. Defendant petitioned the district court for a writ of habeas corpus, challenging the constitutionality of the statute which was the basis of his state court conviction. The district court did not reach the merits, holding that defendant's guilty plea in the state court precluded federal habeas corpus relief. The court of appeals reversed and remanded.

The court distinguished the instant case from Brady v. United States, 397 U.S. 742 (1970), in which the Supreme Court established a bar to federal habeas corpus as a vehicle for collaterally attacking an alleged deprivation of constitutional rights prior to the entry of the plea. In contrast, defendant here argued that he had been prosecuted under an unconstitutional statute. Such a contention falls within the rule of Blockledge v. Peny, 417 U.S. 21 (1974), which holds that a guilty plea does not bar those claims which go to the power of the state to invoke criminal process against the defendant. "The statute, if unconstitutional, would be void and the conviction a nullity ab initio. . . . Thus, Journigan's claim goes to the very authority of the state to haul him into court." Accordingly, defendant's guilty plea does not bar federal habeas corpus. Journigan v. Duffy, 552 F.2d 283 (1977), 14 CLB 157.

§37.60. —Exhaustion of state remedies

U.S. Supreme Court Petitioner, who was convicted of rape in state court, filed a habeas corpus petition. The district court denied the petition on the ground that "this issue has never been presented to any state court." This conclusion was premised upon the absence of any reference to the contention in the reported opinion of the Alabama Court of Criminal Appeals. The Court of Appeals for the Fifth Circuit subsequently denied petitioner's pro se application for a certificate of probable cause and for leave to appeal.

In reversing, the Supreme Court found that the district court had committed plain error:

> "It is too obvious to merit extended discussion that whether the exhaustion requirement of 28 U.S.C. § 2254(b) has been satisfied cannot turn upon whether a state appellate court chooses to ignore in its opinion a federal constitutional claim squarely raised in petitioner's brief in the state court, and, indeed, in this case, vigorously opposed in the State's brief. It is equally obvious that a district court commits plain error in assuming that a habeas petitioner must have failed to raise in the state courts a meritorious claim that he is incarcerated in violation of the Constitution if the state appellate court's opinion contains no reference to the claim."

Smith v. Digmon, 98 S. Ct. 597 (1978), 14 CLB 351.

§37.75. —Procedure

U.S. Supreme Court After unsuccessful efforts to overturn his state court conviction on direct appeal and state collateral attack, petitioner sought a writ of habeas corpus in a federal district court, which on October 21, 1975 ordered his release from respondent Corrections Director's custody unless the state retried him within sixty days. Twenty-eight days after entry of the order, respondent moved for a stay of the conditional release order and for an evidentiary hearing. The district court granted the motion but after a hearing ruled, on January 26, 1976, that the writ of habeas corpus was properly issued.

Respondent immediately filed a notice of appeal seeking review of both the October 21 and January 26 orders and the court of appeals reversed. Federal Rule App. Proc. 4(a) and 28 U.S.C. § 2107 require that a notice of appeal in a civil case be filed within thirty days of entry of the judgment or order from which the appeal is taken, but under Rule 4(a) the running of time for filing an appeal may be tolled by a timely motion filed in the district court, pursuant to the Federal Rules of Civil Procedure, Rule 52(b) or 59.

In reversing, the Supreme Court noted that the court of appeals lacked jurisdiction to review the *original* October 21 order because respondent's motion for a stay and an evidentiary hearing was untimely under Rule 52(b) or 59 and thus could not toll the running of the "mandatory and jurisdictional" thirty-day time limit of Rule 4(a). In so finding, the Court held that the October 21 order was a "final order" for purposes of an appeal under 28 U.S.C. § 2253 since the absence of an evidentiary hearing does not render a release order nonfinal.

The Court stated that the Federal Rules are applicable to habeas corpus proceedings because it is well settled that habeas corpus is a civil proceeding.

Although the Court noted that it had never before held Rules 52(b) or 59 applicable in habeas corpus proceedings, it saw no reason to disagree with a number of lower court decisions finding such rules to be so applicable. Browder v. Director, Dep't of Corrections of Ill., 98 S. Ct. 556 (1978), 14 CLB 354.

38. SENTENCING AND PUNISHMENT

PUNISHMENT

§38.70. Credit for time spent in custody prior to sentencing

Wisconsin Defendant was convicted of murder and attempted armed robbery and was sentenced to life imprisonment for the murder conviction and fifteen years for the attempted armed robbery, with the sentences to run consecutively. In a postconviction proceeding, defendant sought to have the six months he served prior to trial, due to his inability to make bail, credited as time served against the terms for the murder and attempted armed robbery. The lower court denied the application.

On appeal, held, reversed. Equal protection demands that a poor person who is convicted of a crime shall spend no more time in custody than a person in more affluent circumstances who makes bail. The court further noted that a credit for presentence detention has the dual effect of shortening the sentence and also results in earlier parole eligibility.

Thus, the court came to the following three conclusions: Since a life sentence does not expire until the death of the prisoner, presentence detention credit will not shorten the sentence. However, credit for presentence detention should be applied to calculate the date on which the defendant becomes eligible for parole from his murder sentence. Finally, the presentence detention credit is not to be applied to reduce both sentences where there have been consecutive sentences. Wilson v. State, 284 N.W.2d 234 (1978), 14 CLB 467.

§38.90. Multiple punishment

U.S. Supreme Court Petitioners were convicted before the U.S. District Court for the Eastern District of Kentucky of two separate aggravated bank robberies and of using firearms to commit the robberies. They were sentenced to consecutive terms of imprisonment on the robbery and firearms counts, and they appealed. The Court of Appeals for the Sixth Circuit affirmed, and certiorari was granted.

This issue presented to the Court was

whether, in a prosecution growing out of a single transaction of bank robbery with firearms, a defendant may be sentenced under both Section 2113(d), allowing enhancement of the punishment for bank robbery when the robbery is committed "by the use of a dangerous weapon or device," and Section 924(c), which provides that whoever uses a firearm to commit a felony for which he may be prosecuted in federal court, shall be subject to a penalty, in addition to punishment provided for the commission of such felony. In answering the question in the negative, the Court invoked the use of statutory construction that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of leniency." Thus, while Section 924(c) creates an offense distinct from the underlying felony, this does not necessarily permit the imposition of cumulative punishment. In the case of these two statutes, the Court found, from its review of legislative history, that "the purpose of § 924(c) is already served whenever the substantive federal offense provides enhanced punishment for use of a dangerous weapon." The Court therefore reversed and remanded. Simpson v. United States, 98 S. Ct. 909 (1978), 14 CLB 454.

§38.100. —Merger doctrine

Court of Appeals, 9th Cir. Defendants, three former police officers, were convicted before the district court of conspiracy to assist various narcotic dealers in the manufacture and sale of narcotic drugs, in violation of 18 U.S.C. § 371, and in violation of the federal antiracketeering statute, 18 U.S.C. § 1962.

On appeal, defendants argued that the relationship between counts one and two of the indictments called for the application of the Wharton Rule, which states that an agreement by two or more persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to require the participation of two persons for its commission.

The court of appeals affirmed the convictions, holding the Wharton Rule inapplicable in this case. First, the plain language of the antiracketeering statute sets it apart from the crimes that are covered by the rule, since it clearly imports that the statute may be violated by an individual acting alone. Second, even if the facts had presented a Wharton situation, "the juxtaposition of the substantive crime of racketeering and the offense of conspiring to engage in racketeering activity is more than ample evidence that congress intended section 1962(c) to stand as an offense separate from the general federal conspiracy crime." United States v. Ohlson, 552 F.2d 1347 (1977), 14 CLB 165.

§38.110. —What constitutes a prior felony conviction

Court of Appeals, 6th Cir. After his conviction for possession of firearms and heroin, the defendant was adjudged to be a dangerous special offender under 18 U.S.C. § 3575 and sentenced to an additional nineteen years.

The court of appeals vacated defendant's sentence as a dangerous special offender on the ground that while his prior conviction for armed robbery occurred within the five years of the current felony, the subsequent reversal of the conviction took it outside the scope of the statute: "The statute clearly provides that '[a] conviction shown on direct or collateral review . . . to be invalid' . . . cannot be considered in determining whether the defendant is a dangerous special offender." Watkins v. United States, 564 F.2d 201 (1977), 14 CLB 461.

39. THE APPEAL

§39.35. Scope of appellate review

U.S. Supreme Court Following petition-

er's conviction for murder, assault, and drug offenses, the Arizona Supreme Court reversed the murder and assault convictions because of erroneous jury instructions, but affirmed the judgments of conviction on the drug counts. Petitioner requested a stay of his second trial on the murder and assault counts because he claimed that certain unconstitutionally seized evidence would be admitted at trial. The evidence in question was found to be properly admitted in the first trial by the Arizona Supreme Court, but a petition for certiorari on that issue was pending before the Supreme Court.

Justice Rehnquist denied the petition, holding that it was unnecessary to reach the merits of the claim since a stay of a retrial cannot be granted when the only constitutional objection raised concerns the admissibility of evidence. Petitioner's claim was based on constitutional prohibitions against the admission of certain evidence at trial, and would be sufficiently vindicated by his release from incarceration imposed as a result of a conviction in reliance on such evidence. Unlike a double jeopardy claim, such a claim must be asserted through normal post-trial avenues of review. Mincey v. Arizona, 98 S. Ct. 23 (1977), 14 CLB 155.

§39.65. Bail pending appeal

U.S. Supreme Court The applicant was convicted of conspiracy to possess marijuana with intent to distribute and he was sentenced to five years' imprisonment. Before trial, bail was set at $1 million which was later reduced to $750,000. Since the applicant could not raise bail, he remained incarcerated pending the disposition of his appeal.

Arguing that his bail was set at an excessive and unreasonable amount, the applicant pointed out that neither the district court nor the court of appeals made a specific finding that he would fail to appear or give any other reason, despite the requirements of 18 U.S.C. § 3146(d). In response to the application, the government presented the following evidence adduced at trial:

> "Applicant was involved in a large-scale smuggling enterprise, which imported marijuana into Texas from Mexico in loads of 200 to 700 pounds; the marijuana was then distributed to locations as far away as Indiana; applicant's wife, a co-indictee, acted as his 'connection' in Mexico and is currently a fugitive there; another associate in the enterprise is also a fugitive; and applicant and his associates were frequently in possession of large amounts of cash."

In light of these facts, Justice Powell saw no reason to disturb the rulings of the lower courts. Mecom v. United States, 98 S. Ct. 19 (1977), 14 CLB 154.

40. PROBATION AND PAROLE

§40.05. Revocation of probation

Georgia Petitioner appealed from an order revoking probation on the ground that the sentence of probation was illegally revoked.

While on probation, petitioner was charged with burglary, tried, and acquitted. At the subsequent probation revocation hearing, the judge had before him the same evidence adduced in the burglary trial.

The petitioner argued that principles of collateral estoppel and double jeopardy precluded the revocation of probation based on a crime for which he had been acquitted.

Held, order revoking probation affirmed. As the court concluded:

> "We adopt the language of the Supreme Court of the United States in the case of *Morrissey v. Brewer*, 408 U.S. 471, 480, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972), cited by the Court of Appeals, which states: 'The revocation of parole is not part of a criminal prosecution and

thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations. . . . Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions.'

"Before a jury is authorized to convict, evidence must be presented which will establish guilt of the defendant beyond a reasonable doubt. Even when this is done a jury has the power to acquit. This quantum of evidence is not necessary to justify the revocatoin of a sentence of probation."

Johnson v. State, 242 S.E.2d 53 (1978), 14 CLB 465.

42. ANCILLARY PROCEEDINGS

JUVENILE DELINQUENTS AND YOUTHFUL OFFENDERS

§42.110. —Youthful offender

U.S. Supreme Court After prisoners pleaded guilty in separate proceedings to offenses for which penalties of fine or imprisonment or both are provided, their sentences were affirmed by the U.S. District Court for the District of Maryland and by the U.S. Court of Appeals for the Fourth Circuit.

On certiorari, petitioners argued that a sentence of probation under Section 5010 (a) of the Youth Corrections Act (YCA) is a substitute for any other penalty provision, and since Section 5010(a) does not expressly authorize fines, the authority to impose them cannot be imputed from any other penalty provision.

In rejecting this argument and affirming the lower court rulings, the U.S. Supreme Court argued that while Section 5010(a) "neither grants nor withholds the authority to impose fines or orders of restitution," Section 5023(a) of the YCA incorporates by reference the authority conferred under the general probation statute, 18 U.S.C. § 3651, which permits such fines. After analyzing the legislative history of these sections, the Court concluded that "Congress's purpose in adopting § 5023(a) was to assure that a sentence under § 5010(a) would not displace the authority conferred by § 3651 to impose fines and orders of restitution as conditions of probation." Durst v. United States, 98 S. Ct. 849 (1978), 14 CLB 456.

PART V — CONSTITUTIONAL GUARANTEES

43. ADMISSIONS AND CONFESSIONS

GROUNDS FOR EXCLUSION; GENERALLY

§43.15. —Promises of leniency

Court of Appeals, 5th Cir. On his appeal from conviction on a drug charge, the defendant argued that the trial court erroneously admitted into evidence certain admissions made by him during the course of plea bargaining discussions with two Drug Enforcement Administration agents. Defendant's admissions were that he stated that he wished to cooperate and "tell everything" if his wife was not prosecuted along with him.

The defendant relied on United States v. Ross, 493 F.2d 771 (5th Cir. 1974), but the court found that a critical distinction could be made:

"In both cases the negotiating defendant was negotiating not about his own plea or leniency for himself, but about

leniency for a third person. Despite the similar nature of the negotiations here and in *Ross*, appellant can take no comfort in *Ross* because there is a fundamental distinction between the two cases. In *Ross* the proposed bargain was not consummated; the wife was prosecuted. Thus, *Ross* merely stands for the proposition that evidence of negotiations for the benefit of a third party must be excluded if a bargain is not consummated. This is so because: 'it is inherently unfair for the government to engage in such an activity, only to use it as a weapon against the defendant when negotiations fail.'

"*Ross*, 493 F.2d at 775."

In the case at bar, the negotiations succeeded and the bargain was consummated; the defendant was required to stand trial "because the bargain was not for a plea of guilty to a reduced charge, but for leniency to a third person." United States v. Robertson, 560 F.2d 647 (1977), 14 CLB 253.

§43.60. Fruit of an illegal arrest

Maryland Defendant, convicted of armed robbery, contended on appeal that the in-court identification of him by two eyewitnesses should not have been admitted, since the witnesses had previously seen a photograph of him that was taken pursuant to an illegal arrest.

Held, on appeal, conviction affirmed. The "fruit of the poisonous tree" doctrine does not mean that should there be an illegal arrest, later identification of defendant cannot be made. The court of appeals pointed out that both the victims and witnesses apparently had ample time to observe the robber during the incident. After his arrest, his photograph was shown to the witnesses and they identified him. They also observed him at numerous court appearances. At the trial, the witnesses testified that their identification of defendant was based solely on their recollection of the incident.

In determining that the illegal arrest did not vitiate the in-court identifications, the court of special appeals noted that the identification evidence had not been obtained by exploiting the illegality.

The court wrote that a person's identity is learned as a natural consequence of any arrest and that, absent a showing that an illegal arrest was affected solely to learn a person's identity, in-court identification is permissible if not based on the tainted arrest process. To rule otherwise, the court concluded, would in effect immunize defendant from any possible prosecution. Baker v. State, 383 A.2d 698 (1978), 14 CLB 469.

VIOLATIONS OF *MIRANDA* STANDARDS AS GROUNDS FOR EXCLUSION

§43.65. General construction and operation of Miranda

Georgia Defendant, convicted of murder, contended on appeal that *Miranda* warnings were insufficient in that he had not been advised that he was entitled to have an attorney present during interrogation.

Held, on appeal, affirmed. *Miranda* warnings need not be set forth literally.

Here, the suspect was advised that he did not have to say anything to the officers; if he did, what he told them could and would be used against him in a court of law; that he had the right to an attorney; and if he could not afford an attorney, one would be provided.

The court ruled that it was implicit in these warnings that if defendant desired an attorney, the interrogation would cease until an attorney was present.

Concluding that justice does not demand that every oversight in making a *Miranda* statement must result in a reversal, the court found no fault with the warnings. Eubanks v. State, 240 S.E.2d 54 (1977), 14 CLB 373.

§43.70. Prerequisite of custodial interrogation

Court of Appeals, 5th Cir. On an appeal from defendant's conviction for bank theft, the issue before the court of appeals was whether defendant's oral admissions were admissible due to the absence of *Miranda* warnings. The record indicated that the FBI agent interviewed the defendant, a bank janitor, after it was learned that he was the last person with the opportunity to take the money. The defendant was confronted with the evidence against him in the security office of the bank, the door of which was closed. Only after the defendant admitted the theft did the agent identify himself and administer the *Miranda* warnings.

In determining whether the interrogation was custodial or not, the court first identified the following significant criteria: "(1) probable cause to arrest, (2) subjective intent of the police to hold the suspect, (3) subjective belief of the defendant as to the status of his freedom and (4) whether the investigation has focused on the suspect."

Applying these factors to the case at bar, the court concluded that the defendant had been subjected to a custodial interrogation. There was more than sufficient probable cause to arrest; the defendant was interrogated behind closed doors; and he was not informed of his right to leave until after the confession was elicited. In addition, the investigation had already focused upon the defendant. United States v. Nash, 563 F.2d 1166 (1977), 14 CLB 254.

Court of Appeals, 9th Cir. Defendants were convicted in the District Court for the Northern District of California of two robberies of a federally insured savings and loan association and they appealed. The facts indicated that approximately one week after the second robbery, the two police officers arrested defendants after stopping their car which matched the general description of the vehicle used in the bank robbery.

In affirming the conviction, the court of appeals reasoned as follows:

> "As we have today held, in full reliance on *United States v. Hickman*, investigatory questions can be put to occupants when an automobile is stopped. However, appellants contend that from the instant Officer Cole stopped the car they were in custody and no investigatory questions were proper without the administration of *Miranda* warnings. We hold that the appellants were not in custody until after they had stepped from the car, had matched the general description of the robbery suspects, and Gaines had stated he had access to the car during the days of the robberies."

The court found the facts of the case to be virtually identical to those in *Hickman*: "Here, as in *Hickman*, there is nothing in the record to show that the officers had made a prior determination to arrest the appellants regardless of their responses to questioning. For that matter, the record shows that the arrests were not to be made unless the appellants were identified." United States v. Gaines, 563 F.2d 1352 (1977), 14 CLB 361.

§43.105. Waiver of Miranda rights

Court of Appeals, D.C. Cir. Defendant filed a petition to vacate his sentence for second-degree murder on the ground that statements taken from him at the police station without *Miranda* warnings should have been excluded at trial.

In affirming the district court's denial of the petition, the court of appeals held that, while the statement may have been taken in violation of the defendant's constitutional rights, the failure to raise the objection at trial precluded a later review by habeas corpus:

> "We believe that the District Court in this case offered appellant full oppor-

tunity to object to admission of the now disputed statements. We also believe that the District Judge was right when at the § 2255 hearing he said that appellant's failure to object or present evidence was "a calculated piece of business." Even appellant's counsel at the § 2255 hearing recognized that 'for strategic reasons Mr. Williams [appellant's trial counsel] wanted that statement in.' Although he did not use the words, we believe his § 2255 disposition represented his finding of a deliberate bypassing attributable to the defendant. *United States v. Haywood*, 150 U.S. App. D.C. 247, 464 F.2d 756 (1972)."

United States v. Johnson, 562 F.2d 649 (D.C. Cir. 1976), 14 CLB 462.

§43.110. —Voluntary and intelligent requirement

Court of Appeals, 4th Cir. Defendant, who was 17 years old, was arrested and charged with armed robbery and murder. He was advised of his *Miranda* rights three times and, although he refused to sign anything, spoke freely and admitted his participation in the offense. Defendant, who had an I.Q. of 67, erroneously believed that an oral confession would not be harmful to him and could not be used against him. Defendant's confession was admitted over objection that it was not the product of a knowing and intelligent waiver of his right to remain silent.

Held, in affirming a conviction for felony murder, that "when the police have fully and fairly given a suspect the *Miranda* warnings their duty is discharged, and we hold that they are under no further and additional duty whether or not the suspect acts wisely or foolishly or misapprehends either the facts or the law."

Thus, when a suspect has been correctly warned using the prescribed *Miranda* language and knowingly and intelligently waives his right to remain silent, the state has no duty to correct any misapprehension of the law on the part of defendant. Harris v. Riddle, 551 F.2d 936 (1977), 14 CLB 90.

§43.135. Silence as an admission

Georgia Defendant was convicted of armed robbery. On appeal, he contended that the trial court should have declared a mistrial when the state, while cross-examining him, asked whether he was silent at his arrest and after *Miranda* warnings had been given.

Held, on appeal, affirmed. Since defendant himself put his conduct after his arrest in issue, he could not complain when the prosecutor attempted to impeach his testimony. On direct examination, defendant claimed that he had made no statements to the police. Two detectives, however, had already testified to his incriminating statements at his arrest.

Citing Doyle v. Ohio, 426 U.S. 610 (1976), wherein the Court held that a defendant's post-*Miranda* silence could not constitutionally be used for impeachment, the Georgia Supreme Court noted that the *Doyle* decision made clear that a defendant's post-*Miranda* silence may be used to impeach the defendant's testimony about his behavior following arrest, where he claims he made a statement when arrested.

Thus, the Georgia court reasoned that the state was not attempting to infer guilt from silence, as prohibited in *Doyle*, but was trying to impeach defendant's testimony that he had been silent when arrested. Overcash v. State, 238 S.E.2d 50 (1977), 14 CLB 267.

§43.150. Use of statement obtained in violation of Miranda—impeachment exception

Montana In compliance with Inmate Rules and Guidelines of Montana State Prison, defendant was provided with a lay adviser to assist him in the preparation of a disciplinary hearing. Appearing as

a witness at his own hearing, defendant answered questions posed by his adviser which tended to admit his possession of a knife. Following his admissions, the hearing was adjourned. Later, defendant was tried for illegal possession of a weapon and the prior admissions were entered into evidence. From his subsequent conviction, the defendant appealed.

Held, reversed. The court found that, although the questions were posed by defendant's own lay adviser, the entire proceeding was under the auspices of the prison authority. Further, defendant had not been advised of any potential criminal charges until after he made the incriminating admissions. Therefore, the court ruled that the statements made by defendant to the inmate lay adviser in the course of the prison disciplinary proceeding were later admitted at trial in violation of *Miranda*. State v. Harris, 576 P.2d 257 (1978), 14 CLB 464.

44. CONFRONTATION OF WITNESSES

§44.00. In general

Court of Appeals, 6th Cir. Defendant was convicted of sodomy. The victim, a 32-year-old imbecile, had severely impaired speech and was permitted to testify through his father. Defendant sought habeas corpus relief, claiming that permitting the father to serve as interpreter deprived defendant of the right of confrontation and due process of law.

Held, in sustaining defendant's conviction that defendant's constitutional rights had not been violated. "The trial court in its broad discretion can select a close relative of a witness to serve as an interpreter at the trial." The court noted that the conviction was supported by two disinterested witnesses, the arresting officers, and defendant had ample opportunity to cross-examine them at length.

A dissenting opinion contended that an effort should have been made to ascertain whether a less emotionally involved person than the father could have been found to interpret the victim's testimony, especially since penetration, essential under state law, was established only by the victim's testimony. Fairbanks v. Cowan, 551 F.2d 97 (1977), 14 CLB 89.

Illinois Defendant, convicted of unlawful delivery of heroin, contended on appeal that he had been denied a fair trial and was effectively denied the right to cross-examine the witnesses against him because all of the substance that he allegedly delivered was consumed during preindictment testing.

Held, reversed and remanded. Although the state must test alleged contraband, it has a similar duty to preserve some part of the substance so that an independent chemical analysis may be made by the putative law violator in the event criminal prosecution is later instituted.

After the qualitative test, from which the chemist concluded that heroin was present in the powder, about half of the powder remained. Virtually all of this remaining powder was consumed by the quantitative test, which revealed that some 2.6 percent of the powder was heroin.

The court refused to accept the state's contention that the quantitative test which destroyed the other half of the powder was necessary and reasonable under the circumstances. The qualitative test, the court noted, established that the powder did contain heroin, establishing one of the elements of a class two felony. However, the quantitative test which destroyed the remaining powder and with it the defendant's ability to prepare a defense, was unnecessary and unreasonable.

The court added however that it was not placing upon the state the burden of *always* preserving a portion of items subject to testing and analysis, but was rather

forcing the state to show by clear and convincing evidence that the destruction of all of the substance was necessary. People v. Taylor, 369 N.E.2d 573 (Ct. App. 1977), 14 CLB 269.

§44.05. —Interpretations by State courts

Maine Defendant was convicted of breaking, entering, and larceny. During cross-examination of his accomplice, who was testifying for the state, defendant asked, "Do you know what the maximum punishment was, had you been convicted of breaking, entering, and larceny?" The state's objection to the question was sustained. On appeal, defendant argued that the trial court's refusal to permit the question infringed upon his ability to effectively cross-examine the witness concerning the benefit he would get in testifying favorably for the state.

The Supreme Judicial Court of Maine rejected defendant's appeal, holding that there was no error in denying defendant's right to confront a hostile witness in this one area. Except for this one question, defendant fully cross-examined the accomplice as to the extent of the quid pro quo received for his expected testimony. Had the witness been permitted to state the maximum sentence he could have received, the jury would have become aware of the defendant's possible punishment. In light of the strong policy reasons against informing the jury of defendant's possible punishment, it was more reasonable to exclude the question than to permit a response which could have been highly prejudicial. State v. Larrabee, 377 A.2d 463 (1977), 14 CLB 167.

§44.30. —Limitations on right to cross-examine

Court of Appeals, 6th Cir. Following defendant's conviction for robbery before an Ohio state court, he was granted habeas corpus relief by the District Court for the Southern District of Ohio, and the state appealed. The record on appeal indicated that the trial court granted petitioner's motion to suppress the pretrial identifications as unduly suggestive, but allowed in-court identifications of the petitioners by the same witnesses. Petitioner's attorney attempted to cross-examine these eyewitnesses about their out-of-court identifications, but the trial court judge, having excluded those identifications from the prosecution's case-in-chief, refused to allow such cross-examination.

In affirming the district court, the court of appeals quoted favorably from Davis v. Alaska, 415 U.S. 308 (1974), where the Supreme Court stated: "the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness."

Applying these principles to the facts before it, the court found that the trial judge erred in preventing cross-examination because of the critical nature of the witnesses' testimony:

> "The eyewitness testimony in the instant case was crucial to the state's case and cross-examination designed to challenge the credibility of those identifications was certainly relevant. The state's asserted interest in the finality of suppressions, similar to the state's interest in *Davis*, must fall before defendant's fundamental right of confrontation."

Flowers v. Ohio, 564 F.2d 748 (1977), 14 CLB 364.

§44.35. Opportunity to cross-examine

Court of Appeals, 6th Cir. Defendant was convicted for the unlawful possession, manufacture, and distribution of a controlled substance. During the trial, the court permitted testimony that the informant was paid $200 per week by the government, but it prohibited cross-examination as to the informant's total compensation including reward money over

the two or three years he acted as a paid informant.

In reversing, the court of appeals noted that "relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without evidence, the Federal Rule of Evidence, 401. The court then found that the evidence of how much defendant was receiving from the government for past services and might therefore expect in the future was highly relevant to the question for his potential bias and interest. Therefore, the court of appeals held that trial court's denial of cross-examination here constituted a Sixth Amendment right of confrontation. United States v. Leja 568 F.2d (1977), 14 CLB 460.

45. RIGHT TO COUNSEL

SCOPE AND EXTENT OF RIGHT GENERALLY

§45.15. Absence of counsel during portion of proceedings

Court of Appeals, 5th Cir. Defendants were convicted in the district court of conspiring to unlawfully steal merchandise certificates in the value of more than $100 which were part of an interstate shipment. On appeal, one of the defendants contended that the trial judge erroneously denied her motion to suppress statements obtained from her by the FBI because the interrogation took place in the absence of counsel.

In reversing and remanding, the court of appeals found that the *Massiah* proscriptions applied even though the defendant in the instant case had not yet been indicted at the time the interrogation took place. Defendant was interrogated just prior to a preliminary hearing on state charges arising out of the identical circumstances on which the federal indictment was based. The federal indictment was not returned until about six months later.

Nevertheless, the court observed in the language of Escobedo v. Illinois, 378 U.S. 478 (1964) that the right to consult with counsel attaches "when the process shifts from investigatory to accused." In this case, the process had shifted to the accusatory because the agents were no longer concerned with determining just whether a crime had been committed; the defendant was now their target. Consequently, the failure to ask the defendant whether she wanted her attorney present was not harmless. United States v. Brown, 551 F.2d 639 (1977), 14 CLB 158.

§45.20. Right to continuance of trial to obtain new counsel

Indiana Defendant was taken into custody in August 1975. After being granted several continuances to retain private counsel, he asked for appointed counsel. In November, he discharged that attorney and engaged a private firm to represent him. In April 1976, on the morning of the trial, defendant discharged his attorney and requested a continuance. The court denied the continuance, and after defendant chose to represent himself, the court appointed defendant's former counsel to act as standby counsel and later directed him to take over the defense. When defendant announced that he was discharging his counsel, the trial court questioned him about the basis for his action and defendant answered only that he did not like the way he was being represented. The Indiana Supreme Court noted that the counsel retained by defendant was a highly regarded criminal lawyer. On appeal from his subsequent conviction, the defendant argued that he had been denied a fair trial because the trial court had, in effect, forced him to represent himself since his request for a continuance was denied.

Held, affirmed. The high court ruled

that the defendant had knowingly and intelligently decided to discharge his attorney and proceed pro se, and that defendant's freedom of choice of counsel may not be used as a device to manipulate or subvert the orderly procedure of the courts. Further, it was not error for the trial court to order the standby counsel to take over the defense, since the defendant had announced that he had abandoned his defense and would not participate further. Therefore, the trial court, faced with defendant's obstructionist misconduct, was found to have preserved the defendant's rights throughout the proceeding. German v. State, 373 N.E.2d 880 (1978), 14 CLB 471.

§45.30. Waiver

Texas Defendant was convicted of unlawfully carrying a handgun and he appealed. Defendant had waived his right to counsel below and had proceeded pro se. On appeal, held reversed, since the record did not indicate that defendant's waiver was intelligently made.

The appellate panel was plainly troubled by the barren record below; nowhere had the trial judge given obligatory warnings and admonishments to defendant to substantiate that defendant's waiver had been knowing and intelligent.

Citing Faretta v. California, 422 U.S. 806 (1975), for the rule that the record must show that defendant is competent to waive right to counsel and that he knowingly and intelligently has done so after being made aware of the advantages and disadvantages of self-representation, the court ruled that the record below required reversal.

The only evidence reflected in the trial record regarding defendant's waiver and decision to represent himself was contained in the judgment of the trial court and some of the court's remarks made during the punishment stage of the trial.

The court then concluded that "presuming waiver from a silent record is impermissible. The record must show . . . that an accused was offered counsel, but intelligently and understandingly rejected the offer." Trevino v. State, 555 S.W.2d 750 (Ct. App. 1977), 14 CLB 177.

TYPE OR STAGE OF PROCEEDING

§45.45. Lineups

U.S. Supreme Court After petitioner had been arrested for rape and related offenses he was identified by the complaining witness as her assailant at the ensuing preliminary hearing, during which petitioner was not represented by counsel nor offered appointed counsel. The victim had been asked to make identification after being told that she was going to view a suspect, after being told his name and having heard it called as he was led before the bench, and after having heard the prosecutor recite the evidence believed to implicate petitioner. At trial, the victim testified on direct examination by the prosecution that she had identified petitioner as her assailant at the preliminary hearing, and there was certain other evidence linking petitioner to the crimes. He was convicted and the Illinois Supreme Court affirmed. He then sought habeas corpus relief in federal district court on the ground that the admission of the identification testimony at trial violated his Sixth and Fourteenth Amendment rights, but the court denied relief again on the ground that the prosecution had shown an independent basis for the identification, and the court of appeals affirmed.

In reversing, the Supreme Court held that a pretrial corporeal identification is a critical stage in a criminal prosecution at which the Sixth Amendment entitles the accused to the presence of counsel even if the defendant has not yet been formally indicted. The Court also rejected the lower court's suggestion that the Sixth Amendment right only attaches to a line-

up identification, not to an identification made in court during the course of a judicial proceeding.

Moving to the "independent source" argument raised below, the Court dispensed with this contention as follows:

> "*Gilbert* held that the prosecution cannot buttress its case-in-chief by introducing evidence of a pretrial identification made in violation of the accused's Sixth Amendment rights, even if it can prove that the pretrial identification had an independent source. That testimony is the direct result of the illegal lineup "come at by exploitation of [the primary] illegality,"'" Gilbert v. California, 388 U.S. 263, 272-273 (1967).

The Court, however, remanded for a determination of whether the failure to exclude was harmless error under Chapman v. California, 386 U.S. 18 (1967). Moore v. Illinois, 98 S. Ct. 458 (1977), 14 CLB 355.

ADEQUACY AND EFFECTIVENESS OF COUNSEL

§45.145. Ineffectiveness

Court of Appeals, 5th Cir. Defendants were convicted of armed robbery and attempted murder after a plea of guilty. On appeal, defendant contended that they were not afforded effective assistance of counsel, claiming that the appointed counsel failed to investigate the specific facts of the case and only briefly advised them of their constitutional rights prior to the arraignment.

Held, in affirming the convictions, that defendants were adequately represented by counsel. The court held that in view of the expressed desire of all defendants to plead guilty, counsel did not feel the need to investigate defenses or potential conflicts of interest. Moreover, "the brevity of the time spent in consultation with counsel is only a factor to be considered in the totality of circumstances."

The court concluded that there is a difference between the duty owed to one who goes to trial and held that "the only required duty of counsel when a plea of guilty is entered is that counsel should ascertain if the plea is entered voluntarily and knowingly." Jones v. Henderson, 549 F.2d 995 (1977), 14 CLB 88.

§45.165. —Incorrect legal advice

Court of Appeals, 4th Cir. Defendant, who had been sentenced to two years imprisonment plus a special parole term of two years on his plea of guilty to a charge of conspiring to manufacture a controlled substance, moved to vacate the sentence on the ground that he was denied effective assistance of counsel. The district court denied relief, and an appeal was taken.

In reversing and remanding, the court of appeals noted that defendant's lawyers had advised him that the maximum penalty on both the counts he faced could be doubled in view of the fact that he was a multiple drug offender. When defendant himself brought to the attention of his counsel the Supreme Court decision in Leary v. United States, 395 U.S. 6 (1969), where certain convictions under the Marijuana Tax Transfer Act (under which defendant had been convicted) were barred, one of the lawyers advised him that *Leary* had no effect, that the prior convictions were valid, and that they could have been used against him at trial.

In finding that defendant had been denied the effective assistance of counsel as required by the Sixth Amendment, the court itemized the following grounds for its decision:

> "It seems at once obvious that as a result of the decision in *Leary* and the various decisions considering its effect, Tolliver's lawyers should have advised him that his prior convictions were probably not valid and that it was far from certain that (a) if he testified in

his own behalf, he could be impeached on the basis of the prior convictions; (b) if he were convicted, he could be subjected to the double penalty provisions of the statutes he was found to have violated; and (c) if he were convicted, his punishment could be enhanced because of his prior record, even aside from the statutory double penalty."

Tolliver v. United States, 563 F.2d 1117 (1977), 14 CLB 363.

§45.170. —Failure to introduce evidence or make objections

Massachusetts Defendant, convicted of multiple counts of armed burglary and assault, urged on appeal that his trial counsel was inadequate. In support of this claim, defendant argued that his trial lawyer had failed to file motions to suppress (1) the jacket allegedly worn by defendant during the commission of the crimes; (2) an admission by defendant to the police of his ownership of the jacket; and (3) the in-court identifications of the defendant by the victims.

Held, on appeal, convictions affirmed. Failure to file pretrial motions does not, ipso facto, constitute inadequate representation, for counsel is not required to file motions or assert defenses of little or no value to his client.

The high court then reviewed the record and noted that the motions to suppress would not have been successful and further ruled that the attorney's "failure" to file these motions seemed to be a strategy or tactic rather than an oversight. Commonwealth v. Schlieff, 369 N.E.2d 723 (Ct. App. 1977), 14 CLB 270.

§45.185. —Failure of trial counsel to protect client's appellate rights

Massachusetts Defendant, convicted of assault and battery, assault with intent to rape, and other felonies, argued on appeal that his retained counsel's failure to file a timely bill of exceptions or otherwise preserve defendant's right to appeal constituted ineffective assistance of counsel.

Held, convictions affirmed. When retained counsel believed in good faith that any appellate review would be unsuccessful and that the only hope for relief would be discovery of new evidence, counsel's failure to inform his client of a statutory right to appeal did not deny defendant due process if an appeal would be frivolous.

The Massachusetts High Court noted that the failure of a *court-appointed* counsel to prosecute an appeal is clearly a per se deprivation of the right to counsel unless the defendant waives the appeal or counsel complies with the procedures for withdrawal set forth in Anders v. California, 386 U.S. 738 (1967).

In the instant appeal, the retained counsel had never informed defendant of his statutory right to an appeal (nor did the attorney inform defendant that any appeal based upon a bill of exceptions would most certainly fail). The high court was disturbed by counsel's failure to so inform defendant and cited American Bar Association Standards to indicate that counsel's acts fell short of even minimum professional standards for keeping clients informed. But did this failure rise to the level of denying defendant effective counsel? Since the appeal "would not have the prayer of a chance," the court concluded after examining the record and the justice's report that defendant had not been denied effective assistance of counsel. Pires v. Commonwealth, 370 N.E.2d 1365 (1977), 14 CLB 375.

CONFLICT OF INTEREST

§45.195. In general

Court of Appeals, 4th Cir. Certain witnesses called before the grand jury appealed from an order of the Virginia dis-

trict court disqualifying their attorney, arguing that it denied them their Sixth Amendment right to counsel before the grand jury.

In affirming the order, the court of appeals skirted the Sixth Amendment issue by stating that United States v. Mandujano, 425 U.S. 564 (1976), left in doubt the issue of whether a grand jury witness has the right to counsel. The court found that it did not need to reach that issue because, even assuming that such right to counsel existed, "we are doubtful that the right would be absolute when conflicting with, and when posing a threat to, the public's right to the proper functioning of a grand jury investigation, and to the judge's duty to maintain the integrity of the grand jury proceeding he supervises." [Citations omitted.]

The record in this case apparently indicated that the attorney for the witnesses was himself a witness and a target of the grand jury investigation, and that on voir dire, three of the witnesses indicated that they had asserted their Fifth Amendment rights not to protect themselves but rather to protect their attorney. In light of these facts, the court had little trouble concluding that defense counsel's conflict of interest justified his disqualification. United States v. Barker, 563 F.2d 652 (1977), 14 CLB 256.

§45.200. Representation of co-defendants

U.S. Supreme Court Petitioners, three co-defendants at a state criminal trial in Arkansas, made timely objections for appointment of separate counsel based on their appointed counsel's representations that because of confidential information received from the co-defendants, he was confronted with the risk of representing conflicting interests and could not, therefore, provide effective assistance for each client. The trial court denied these motions and petitioners were subsequently convicted. The Arkansas Supreme Court affirmed, concluding that the record showed no actual conflicts of interest or prejudice to petitioners.

The Supreme Court reversed, holding that the trial judge's failure either to appoint separate counsel or to take adequate steps to ascertain whether the risk of a conflict of interest was too remote to warrant separate counsel, deprived petitioners of the guarantee of "assistance of counsel" under the Sixth Amendment.

The Court noted that an attorney's request for appointment of separate counsel should, absent bad faith, always be granted, reasoning that the defense attorney in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial. Holloway v. Arkansas, 98 S. Ct. 1173 (1978), 14 CLB 452.

46. CRUEL AND UNUSUAL PUNISHMENT

§46.00. In general

Court of Appeals, 5th Cir. Petitioner, a Texas state prisoner, appealed from the district court's denial of habeas corpus relief, arguing that the enhanced sentence he received constituted cruel and unusual punishment in violation of the Eighth Amendment. Under the Texas statute, a defendant with two or more prior felony convictions must be sentenced to life imprisonment.

In reversing the district court and granting the relief, court of appeals applied the Eighth Amendment test set forth in Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), *cert. denied* 415 U.S. 983 (1974): "(1) the nature of the offense, (2) the legislative purpose behind the punishment, (3) the punishment that the defendant would have received in other jurisdictions, and (4) the punishment meted out for other offenses in the same jurisdiction."

In applying these factors, the court noted that, while the defendant's three offenses were for little more than petty

larceny, his sentence would have been as little as five years if he had committed a single first-degree felony, such as murder, aggravated rape, or arson.

Also, in comparing the Texas statute to those of other states, the court observed that "the state of Texas now stands virtually alone in its unqualified demand for life imprisonment for a three-time felon even where his convictions were for minor property crimes involving neither violence nor a remote possibility of violence." Consequently, the court held that the punishment indiscriminately imposed on defendant was too harsh. Rummel v. Estelle, 568 F.2d 1193 (1978), 14 CLB 458.

Minnesota Defendant beat his twelve-year-old adopted son with a baseball bat. He entered a plea of guilty to the charge of aggravated assault with a dangerous weapon. Following acceptance of the plea, the trial court ordered a presentence investigation. On advice of counsel, defendant waived his right of allocution at the sentencing hearing. Instead, his attorney argued that committal to a treatment program would be a more appropriate sentence than incarceration. The trial court, after reviewing the presentence report, sentenced defendant to three to five years imprisonment pursuant to Minnesota's minimum-sentence statute.

On appeal to the Supreme Court of Minnesota, defendant argued that imposition of a prison sentence, rather than committal to a treatment program, constituted cruel and unusual punishment, and that the mandatory minimum-sentence law violates his equal protection right by foreclosing the possibility of a transfer to a treatment program until the minimum sentence is served.

Held, conviction and sentence affirmed. The court held that the Minnesota mandatory minimum-sentence law was constitutional and also rejected defendant's contention that the statutory sentencing scheme denied him equal protection of the laws, citing State v. Witt, 245 N.W.2d 612 (Minn. 1976). Curle v. State, 257 N.W.2d 544 (1977), 14 CLB 175.

§46.05. Death penalty

U.S. Supreme Court After petitioner's death sentence by the Arizona Supreme Court and his petition for certiorari denied by the U.S. Supreme Court, he applied for suspension of the order denying certiorari or, in the alternative, a stay of execution. In his application, petitioner argued that because certiorari had been granted in a case challenging the Ohio death penalty statute, Bell v. Ohio, 97 S. Ct. 2971 (1977), it should have been granted in his case as well.

Recognizing similarities between the two cases, Justice Rehnquist nevertheless held that there were insufficient grounds for review. The petitioner in *Bell* was 16 years old at the time of the trial, had a low I.Q., was considered emotionally immature and abnormal, had cooperated with the police, and had no significant criminal record. The petitioner in the instant case, however, did not allege that he would be aided by an expansion of the statutory list of mitigating circumstances.

Petitioner's second argument, that the Arizona statute was unconstitutional in that it failed to provide for jury participation as to the existence of mitigating circumstances, was also rejected since the court decided in Proffit v. Florida, 428 U.S. 242 (1977), that jury input was not required. Richmond v. Arizona, 98 S. Ct. 8 (1977), 14 CLB 154.

Arizona In two recent appeals from the imposition of the death penalty for first-degree murder, the Arizona Supreme Court had upheld the constitutionality of the state's statutory scheme for capital punishment.

In State v. Knapp, defendant argued that the trial court erred by rejecting certain evidence of mitigating circumstances

and by finding that aggravating circumstances existed. On the issue of mitigating circumstances, the court noted that the burden of establishing such circumstances rests with the defendant. Defendant failed to meet this burden when he argued that he was under duress because he was afraid that his wife was going to leave him. This is not the kind of duress that rises to the level of a justification defense.

The Arizona Supreme Court also held that the trial court was justified in finding the presence of aggravating circumstances. This finding was based on the fact that defendant caused his two infant children to be burned to death. Thus the defendant committed the offense in an "especially heinous, cruel or depraved manner," one of the statutory circumstances justifying the death penalty.

The court also rejected the argument that the death penalty is cruel and unusual punishment under all circumstances, a contention that was rebuffed in Gregg v. Georgia, 428 U.S. 153 (1977) in regard to the Eight and Fourteenth Amendments.

In State v. Jordan, defendant contended that the Arizona death penalty was unconstitutional as, in Freeman v. Georgia, 408 U.S. 238 (1972), it allowed the jury to impose the death penalty in an arbitrary and capricious manner. In the Arizona statutory scheme, the sentencing power in fact rests with the trial judge, who is required to give due consideration to all aggravating and mitigating circumstances. Consequently, the court had no trouble in concluding that, since the judge's discretion was narrowly circumscribed, there was very little likelihood that the death penalty would be freakishly or arbitrarily imposed. The court also noted that appellate review provided an additional safeguard. State v. Knapp, 562 P.2d 704 (1977); State v. Jordan, 561 P.2d 1224 (1976), 14 CLB 94.

Arkansas Defendant robbed a service station and shot the attendant seven times, killing him. He was convicted of capital felony murder and he appealed his conviction and the imposition of the death sentence. On appeal, defendant's main contention regarding the death penalty statute centered around the mitigation-evidence rules. The trial court had instructed the jury that it might consider five or more mitigating circumstances. Defendant argued that the people should have the clear burden of establishing the absence of any mitigating circumstances.

Held, conviction and sentence affirmed, and death penalty statute upheld as constitutional. The Arkansas Supreme Court distinguished the instant case from Mullaney v. Wilbur, 421 U.S. 684, 84 S. Ct. 1881 (1975), where the court held that the prosecution must prove every element of the crime and the burden did not shift to the defendant to prove he was acting with "heat or passion" in order to reduce his charge from murder to manslaughter. In the instant case, the issue of guilt of the crime charged had already been resolved against defendant before mitigating circumstances were considered by the jury. The court also rejected defendant's contention that the death penalty statute was constitutionally invalid because "it does not provide for automatic appeal and makes no provision for comparative review of similarly situated defendant," citing Collins v. State, 548 S.W.2d 106, and Neal v. State, 548 S.W.2d 135 (1977). Hulsey v. State, 549 S.W.2d 73 (1977), 14 CLB 91.

New York New York statutes provide for mandatory imposition of the death penalty in all cases where a person over 18 years of age is found to have intentionally caused the death of a police officer in the line of duty where defendant knew or had reason to know that the victim was a police officer.

Ruling that the recent Supreme Court case of *Roberts (Harry) v. Louisiana,* which had invalidated a similar Louisiana

capital punishment statute, controlled, the New York court voided the mandatory death penalty law since the statute did not permit various mitigating factors to be raised in defense.

As the Supreme Court had ruled:

> "To be sure, the fact that the murder victim was a peace officer performing his regular duties may be regarded as an aggravating circumstance. . . . But it is incorrect to suppose that no mitigating circumstances can exist when the victim is a police officer. Circumstances such as the youth of the offender, the absence of any prior conviction, the influence of drugs, alcohol or extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct are all examples of mitigating facts which might attend the killing of a peace officer and which are considered relevant in other jurisdictions."

The court of appeals noted that the death penalty law does not allow consideration of particularized mitigating factors for purposes of the capital sentencing decision, but added that New York law provides numerous defenses in its penal laws, viz., intoxication, infancy, duress, and the like. However, the court pointedly wrote that these *defenses* are not synonymous with the mitigating factors described by the Supreme Court. Defenses in New York law do not take into account the character, propensity, record, or attributes of the individual offender. And New York law, the court concluded, does not permit a jury, that has rejected these defenses raised by a defendant, to then mitigate the punishment by resurrecting the defenses. People v. Davis, 43 N.Y.2d 17 (Ct. App. 1977), 14 CLB 368.

Ohio Defendant was found guilty of three counts of aggravated murder and sentenced to death.

Held, on appeal, the Ohio capital punishment statutes are constitutional.

Defendant attacked the constitutionality of Ohio's capital sentencing procedure, arguing that the defendant should not have the burden of proving mitigating circumstances by a preponderance of the evidence in order to escape imposition of the death sentence. Instead, he urged that the people must prove, beyond a reasonable doubt, the absence of mitigating circumstances once the issue has been raised.

Rejecting this contention, the court noted that the mitigation proceeding established by Ohio law is not an adversary proceeding, and that neither defendant nor the people are required by law to offer testimony or other evidence of mitigation circumstances. Should the court find by a preponderance of the evidence that mitigating circumstances exist, it should impose a sentence of life imprisonment. The court added that even if defendant presents no evidence, the judge may nonetheless find in his favor. State v. Downs, 364 N.W.2d (1977), 14 CLB 92.

Texas Defendant was convicted of capital murder before a Texas court and the death penalty was imposed. On appeal, defendant argued that the trial court committed reversible error in not permitting a psychologist to give testimony during the punishment phase of the trial relating to whether or not probability existed that the defendant would commit criminal acts of violence such as would constitute a continuing threat to society. The court of criminal appeals, agreeing with this argument, reversed and remanded.

The Texas death penalty statute requires that the jury consider "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." (Art. 37.071(b)(2).)

The Supreme Court, in upholding the

Texas death penalty Statute in Jurek v. Texas, 428 U.S. 262 (1976), specifically noted that Article 37.071(b)(2) provided the necessary ingredient that rendered the death penalty statute constitutional. "What is essential," the court stated in Jurek, "is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine."

After discussing the Supreme Court's rationale for upholding the Texas statute in the *Jurek* case, the Texas appellate court noted that its decision to reverse was based on equitable grounds as well. Since psychiatric testimony is admissible on behalf of the state at the punishment stage of trial, the preferable approach would permit a similar right to the defendant. Robinson v. State, 548 S.W.2d 63 (Ct. App. 1977), 14 CLB 92.

§46.07. —Rape

U.S. Supreme Court While serving various sentences for murder, rape, kidnapping, and aggravated assault, petitioner escaped from a Georgia prison and in the course of committing an armed robbery and other offenses raped an adult woman. He was convicted of rape, armed robbery, and the other offenses, and sentenced to death on the rape charge when the jury found two of the aggravating circumstances present for imposing such a sentence: namely, that the rape was committed (1) by a person with prior capital-felony convictions and (2) in the course of committing another capital felony, armed robbery. The Georgia Supreme Court affirmed both the conviction and sentence.

In reversing and remanding, the Supreme Court applied the test articulated in Gregg v. Georgia, 408 U.S. 238 (1972), as to whether the Eighth Amendment bars the death penalty for a particular crime as cruel and unusual punishment. Under *Gregg*, a punishment is "excessive" and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment; or (2) is grossly out of proportion to the severity of the crime.

In support of its finding that capital punishment for rape failed the second of these tests, the court pointed out that the present public attitude, as evidenced through state legislatures and sentencing juries, is that death is a disproportionate penalty for rape. Georgia is the only state which authorizes the death sentence for rape of an adult woman and in the vast majority of rape convictions in Georgia since 1973, juries have not imposed the death penalty.

The Supreme Court said that although short of homicide, rape is the "ultimate violation of self," it does not compare with murder. Rape, by definition, does not include death or serious bodily injury to another person. The rape victim, unlike the murder victim, at least has the chance to rebuild her life. Thus, the death penalty is excessive and grossly out of proportion to the severity of the crime. Coker v. United States, 97 S. Ct. 2861 (1977), 14 CLB 81.

47. DOUBLE JEOPARDY

§47.00. In general

U.S. Supreme Court After respondent was found guilty of murder, the Arizona trial court granted a new trial because the prosecution had withheld exculpatory evidence from the defense. At the beginning of the new trial, the trial judge, after extended argument, granted the prosecutor's motion for a mistrial predicated on improper and prejudicial comment during defense counsel's opening statement that evidence had been hidden from respondent at the first trial. However, the judge did not expressly find that there was "manifest necessity" for a mistrial or expressly state that he had considered alternative solutions. The Arizona Supreme Court refused to review the mistrial rul-

ing, and respondent sought a writ of habeas corpus in federal district court. While agreeing that defense counsel's opening statement was improper the district court held that respondent could not be placed in further jeopardy and granted the writ because the state trial judge had failed to find "manifest necessity" for a mistrial. The U.S. Court of Appeals for the Ninth Circuit affirmed.

In reversing, the Supreme Court noted that considerable deference should be given to the trial judge on the issue of whether or not to grant mistrials. In addition, the Court stated that the important issue is not whether the trial judge made an explicit finding of "manifest necessity," but "whether the record reflects the kind of 'necessity' for the mistrial ruling that will avoid a valid plea of double jeopardy. . . ."

In the instant case, the Court concluded that the record reflected the requisite "high degree" of necessity since the trial judge "acted responsibly and deliberately, and accorded careful consideration to respondent's interest in having the trial concluded in a single proceeding." Arizona v. Washington, 98 S. Ct. 824 (1978), 14 CLB 455.

U.S. Supreme Court Petitioners were charged in a single-count indictment with conspiracy and an attempt to obstruct interstate commerce by means of extortion in violation of the Hobbs Act. Petitioners challenged the indictment as duplicitous, contending that the single count improperly charged both a conspiracy and an attempt to violate the Hobbs Act. The district court refused to dismiss the indictment but required the prosecution to prove all the elements of both offenses charged in the indictment, and instructed the jury to that effect. The jury returned a guilty verdict against each petitioner.

The court of appeals reversed and ordered a new trial on evidentiary grounds, at the same time directing the government to elect between the conspiracy and attempt charges on remand. After the government elected to proceed on the conspiracy charge, petitioner moved to dismiss the indictment on grounds that the retrial would expose them to double jeopardy. The district court denied defendant's motion, and the court of appeals affirmed.

The Supreme Court also affirmed, rejecting petitioners' argument that the jury might have convicted them on the attempt charge while acquitting them on the conspiracy charge, thus prohibiting their retrial on the conspiracy charge. The Court pointed out that the trial court had instructed the jury it would have to find that the government had established all of the elements of both crimes before it could return a verdict of guilty. Abney v. United States, 97 S. Ct. 2034 (1977), 14 CLB 84.

Court of Appeals, 2d Cir. The district court imposed dual punishment for violations of both the conspiracy and "continuing criminal enterprise provisions of the Comprehensive Drug Abuse Prevention and Control Act." The defendant appealed, arguing that the conspiracy was both a lesser included offense and one of the series of criminal activities charged in the continuing enterprise count.

In vacating the sentence and fine imposed on the conspiracy count, the court of appeals applied the so-called Blockburger test in determining whether the double jeopardy clause prohibited the imposition of a dual sentence:

> "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932)."

In applying this test to the facts, the court found that both counts stemmed from the defendant's leadership of a large conspiratorial organization trafficking in illicit drugs and that the elements of each count were identical since "to act 'in concert' to violate the law necessarily includes conspiring to do so. . . ." Thus, the conspiracy conviction was reversed. United States v. Sperling, 560 F.2d 1050 (1977), 14 CLB 255.

§47.20. Mistrials

Court of Appeals, 8th Cir. Defendant was convicted before the District Court for the Eastern District of Arkansas of making a false oath and account in relation to bankruptcy proceedings and fraudulently transferring and concealing assets in contemplation of bankruptcy. On appeal, the defendant argued that his retrial should have been barred by the double jeopardy clause because of the prosecutor's misconduct at the first trial.

In reversing the conviction, the court noted that the double jeopardy clause generally does not stand in the way of reprosecution where the defendant has requested the mistrial. The court, however, pointed out that

> "The Supreme Court has recognized, however, limited circumstances where a defendant's mistrial request does not remove the Double Jeopardy bar. For example, the Double Jeopardy Clause protects a defendant against governmental actions intended to provoke mistrial requests. *United States v. Dinitz, supra,* 424 U.S. at 611, 96 S.Ct. 1075. It bars retrials where the underlying error is 'motivated by bad faith or undertaken to harass or prejudice' the defendant. *United States v. Dinitz, supra,* 424 U.S. at 611, 96 S.Ct. at 1082. Thus, where 'prosecutorial overreaching' is present, *United States v. Jorn, supra,* 400 U.S. at 485, 91 S.Ct. 547, the interests protected by the Double Jeopardy Clause outweigh society's interest in conducting a second trial ending in acquittal or conviction. *United States v. Kessler,* 530 F.2d 1246, 1255-56 (5th Cir. 1976). *See United States v. Wilson,* 534 F.2d 76, 80 (6th Cir. 1976)."

In reviewing the trial transcript, the court agreed with the defendant's contention that the prosecutor's reading of the defendant's grand jury testimony to the trial jury constituted prejudicial error. United States v. Martin, 561 F.2d 135 (1977), 14 CLB 257.

§47.25. —Reason for grant

U.S. Supreme Court Applicant requested a stay of his second trial pending the disposition of a writ of certiorari. His first trial ended in a mistrial.

Held, stay denied. Justice Rehnquist pointed out that double jeopardy attaches after a mistrial only in extraordinary circumstances. There must be a showing that the error committed by the prosecution or by the court was made for the court for the purpose of forcing the defendant to move for a mistrial. Only where "bad-faith" conduct by the judge or prosecutor threatens the "harassment of an accused by successive prosecutions or declaration of mistrial so as to afford the prosecution a more favorable opportunity to convict" will retrial be barred. Divans v. California, 98 S. Ct. 1 (1977), 14 CLB 155.

§47.35. —Dual sovereignty doctrine

U.S. Supreme Court When it came to the attention of the Justice Department that a defendant had been successfully prosecuted for robbery under state law and then subsequently prosecuted for the same robbery under federal law, the government moved to dismiss on the grounds that the federal prosecution had violated the department's own *Petite* policy against dual prosecutions. The district court judge, however, denied the motion on the ground that it was untimely, and the

Court of Appeals for the Fifth Circuit affirmed.

In vacating the judgment and remanding, the Supreme Court reviewed the history of the *Petite* policy. The Constitution does not deny the state and federal governments the power to prosecute for the same act. However, the potential for abuse in a rule permitting duplicate prosecutions requires great self-restraint. Thus, while not constitutionally mandated, the Justice Department has adopted the policy of refusing to bring a federal prosecution following a state prosecution except when necessary to advance compelling interests of federal law enforcement.

In view of these considerations, the Court found that the court of appeals had focused upon the wrong issue:

> "The Court of Appeals considered the prosecutor's representations incompatible with the public interest in preserving the integrity of the courts. The salient issue, however, is not whether the decision to maintain the federal prosecution was made in bad faith but rather whether the Government's later efforts to terminate the prosecution were similarly tainted with impropriety. Our examination of the record has not disclosed (and we will not presume) bad faith on the part of the Government at the time it sought leave to dismiss the indictment against petitioner."

Thus, the Court held that the defendant should receive the benefit of the *Petite* policy whenever its application is urged by the government. Rinaldi v. United States, 98 S. Ct. 81 (1977), 14 CLB 251.

Court of Appeals, 3d Cir. Defendants appealed from their conviction under the Federal Racketeering Act (18 U.S.C. §§ 1961 et seq.) claiming that the Racketeering Act prosecution should have been barred by the double jeopardy clause of the Fifth Amendment because of a prior acquittal in state court on bribery charges.

In rejecting this argument and affirming the convictions, the court cited Abbate v. United States, 359 U.S. 187 (1959), where the Supreme Court reaffirmed the general principle that a federal prosecution is not precluded by a prior state prosecution of the same person for the same act. Defendants attempted to distinguish *Abbate* by arguing that in that case the successive prosecutions were for violations of different statutes of different sovereigns while here, 18 U.S.C. § 1961 did not really cover a separate violation since it merely made it a federal crime to commit a "pattern" of state offenses. The court analyzed this claim as follows:

> "Section 1961 *et seq.* of the Federal Racketeering Act forbids 'racketeering,' not state offenses per se. . . . The gravamen of section 1962 is a violation of federal law and 'reference to state law is necessary only to identify the type of unlawful activity in which the defendant intended to engage.' *United States v. Cerone*, 452 F.2d 274, 286 (7th Cir. 1971)."

Moreover, the court found that even though the racketeering statute involved the same operative facts as the state offense, the federal statute "contains an additional element of significance to the federal courts though not the state courts – the effect of their state operation on interstate or foreign commerce through a pattern of racketeering activity." United States v. Frumento, 563 F.2d 1083 (1977), 14 CLB 258.

§47.40. Implied acquittal

Virginia Defendant had been arrested on two felony warrants alleging possession of marijuana with intent to distribute and possession of hashish. After full presentation of the evidence at a preliminary hearing, both charges were dropped. About

two months later, defendant was named in grand jury indictments charging the same offenses and, following a bench trial, was convicted. On appeal to the Supreme Court of Virginia, defendant argued that the dismissal of the charges after the preliminary hearing should have constituted a double jeopardy bar to further prosecution.

Held, convictions affirmed. The preliminary hearing is essentially a screening process. Although state law permits the district judge to proceed to try any lesser included offense should the court find that the felony charges are not supported by probable cause, the court ruled that the district court is not directed to try the misdemeanor where the felony charge is dismissed. It follows, ruled the court, that the mere dismissal of felony charges after a preliminary hearing cannot, without a clear showing in the record, be synonymous with an "assumed" trial and acquittal on any and all lesser included misdemeanor offenses. Therefore, dismissal of a felony complaint at a preliminary hearing will not bar a subsequent prosecution under the principles of double jeopardy. Moore v. Commonwealth, 237 S.E. 2d 187 (1977), 14 CLB 177.

§47.45. Separate and distinct offenses

Court of Appeals, 5th Cir. After being convicted in state court of felony theft, petitioner sought federal habeas corpus relief, claiming that his prior acquittal on burglary charges foreclosed a prosecution for felony theft under the doctrine of collateral estoppel.

In affirming the conviction, the court of appeals pointed out that collateral estoppel only applies if a prior verdict of acquittal necessarily meant that defendant could not have been guilty of the offense charged in the second prosecution. Using this definition, the court noted that the jury at the first trial could not have found the defendant *not* guilty of felony theft because, under Texas law, burglary and theft are separate offenses even if committed during the course of the same transaction. The crucial issues at the two trials thus were significantly different:

> "A jury quite rationally could hold that the State had not identified the burglar beyond a reasonable doubt and, at the same time, be perfectly willing, if the point had been up to it, to find that there was no reasonable doubt about who stole the guns, whether by his own efforts or through the help of his companions. There was nothing inconsistent or mutually exclusive in the verdicts on these issues, dealing with *separate* crimes committed at the same time."

Hutchings v. Estelle, 564 F.2d 713 (1977), 14 CLB 364.

§47.50. —Same transaction

Court of Appeals, 2d Cir. Following the dismissal of defendant's indictment for bank robbery, bank larceny, and armed bank robbery, the government filed a supplemental indictment charging him with conspiracy to commit bank robbery (18 U.S.C. § 371) and carrying a firearm unlawfully during commission of a felony (18 U.S.C. § 924(c)(2)).

On appeal from his conviction for the counts charged in the supplemental indictment, defendant argued that the dismissal of the first indictment "with prejudice" required dismissal of the supplemental indictment as well, reasoning that any prosecution relating to the same transaction is permanently barred by the dismissal on double jeopardy grounds.

In rejecting this argument and affirming the conviction, the court of appeals stated:

> "It is clear that a prosection for conspiracy following an acquittal on the underlying substantive crime is permissible.
>
> "Despite criticism, we have continued to adhere to this rule. Similarly, prosecution for a violation of § 924(c)(2)

would be permissible following an acquittal under § 2113(d). The former requires proof that the defendant was engaged in a felony and was unlawfully carrying a 'firearm.' The latter requires proof of bank robbery and the use of any 'dangerous weapon or device,' which is not limited to firearms. The 'same evidence' test for double jeopardy therefore is not violated." [Citations omitted.]

United States v. Cumberbatch, 563 F.2d 49 (1977), 14 CLB 257.

Massachusetts Defendant, a former bank president, was convicted of ninety-three counts of misapplication of bank funds, receiving fictitious and inadequate obligations, knowingly making or causing to be made false entries in bank records, and loaning funds to borrowers known to have insufficient assets. On appeal, defendant contended that double jeopardy principles were violated when each loan transaction was used to convict for four crimes.

The Supreme Judicial Court of Massachusetts affirmed defendant's conviction, holding that it was not error to charge that each business transaction could produce four distinct violations of law. Although the protection of double jeopardy principles generally forbids two or more punishments for the same crime, it is possible for one act to violate two separate statutory provisions. The test is whether each statutory offense requires proof of an additional fact which the other does not. Since each offense charged against defendant required proof of an additional fact, he was properly charged with four violations for each transaction. Commonwealth v. Kiley, 376 N.E.2d 837 (1977), 14 CLB 166.

49. EQUAL PROTECTION

§49.00. In general

Florida Defendant was arrested initially on a charge of disorderly intoxication. While being booked, however, he struck a police officer in the mouth and was charged under a felony information for battery of a law enforcement officer. Following his plea of nolo contendere, defendant argued on appeal that the statute violated the equal protection clause because it punishes more stringently those who commit assault or battery upon law enforcement officers or firefighters than those who commit the same act upon any other person, without there being any rational basis for such disparity of treatment.

Held, on appeal, affirmed, the legislature may choose to accord greater protection to those who perform indispensable public services. The court noted that the statute (Fla. Stat. § 784.07 (Supp. 1976)) only "protects" fire and police officers when they are performing their public duties and does not therefore set up "an elite class of untouchables" as the defendant had argued.

Citing McLaughlin v. Florida, 379 U.S. 184 (1964), the Florida High Court concluded that the special duty performed by the public servants covered by the statute and the limited scope of the protection – that a misdemeanor assault would be "raised" to a third-degree felony only where the officer was performing official duty when attacked – clearly satisfied the reasonable basis test of the equal protection clause. Soverino v. State, 356 So. 2d 269 (1978), 14 CLB 470.

Maryland Defendant, convicted of distributing an obscene magazine in violation of Maryland's Obscene Matter Statute, appealed. Held, the statute is unconstitutional as violative of the equal protection clause of the Fourteenth Amendment.

The Maryland High Court voided the statute because the law was held to prohibit only *some* employees of legal entities from selling, distributing, publishing, and printing obscene matter, while apparently

allowing other employees to engage in similar activities.

The statutes under which the matter arose were Maryland Code 1957, Art. 7, §§ 417(2) and 418, which provide as follows:

> "Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor. . . .
>
> "'Person' is defined in § 417(2):
>
> "*Person* means any individual, partnership, firm, association, corporation, or other legal entity, but shall not be construed to include an employee of any individual, partnership, firm, association, corporation, or other legal entity operating a theatre which shows motion pictures if the employee is not an officer thereof or has no financial interest therein other than receiving salary and wages."

Defendant worked in a bookstore, employed as a cashier. He was arrested when he sold a certain magazine to a police officer.

The intermediate appellate court had upheld the statute by reasoning that there is a rational basis for a legislative distinction between employees of bookstores and employees of motion picture theaters. That court had grounded its theory of "rational basis" on the fact that only the projectionist in a theater will ordinarily *handle* the obscene film, whereas virtually any employee in a bookstore may come into physical contact with the goods sold. The high court, plainly troubled with this reasoning, rejected it out of hand.

Thus, the court concluded that the statutory discrimination is not based on differences reasonably related to the purpose of the Act, and the distinction has no relevance to the purpose for which the classification is made. Wheeler v. State, 380 A.2d 1052 (1977).

Oregon Defendant was charged with disorderly conduct and resisting arrest. On appeal, she contended that she had been denied equal protection in that she was charged with a higher degree of crime only because she was a woman.

Held, on appeal, affirmed. There was no showing of an intent to invidiously discriminate. The city had a policy of housing women in county jail and men in city jail, resulting in more women than men being charged under state statutes instead of municipal ordinances.

At the trial below, police officers testified that women were not taken to the city jail since cells are not segregated and each cell's sanitary facilities are visible from the other cells.

The officers testified that once a person is in a county jail (as the defendant here was), it is more convenient to charge a violation of a state statute to obviate the necessity of transporting the individual back to the Newberg Municipal Court. Defendant contended that this discrimination caused her to face criminal penalties twice those she would have faced had she been charged under the municipal ordinance.

The Oregon appellate court stated that an equal protection violation lies where the *purpose*, and not only the result of official acts, is invidiously discriminatory.

The court determined that the case at bar involved a statute and an ordinance which are facially neutral and involve no constitutional infirmity by their terms. Rather, the challenged official conduct is the policy of jailing women and charging them under state law. Concerted and purposeful action to discriminate was not shown. Thus, the appellate panel upheld the conviction. However, it is noteworthy

that the court felt constrained to emphasize that the defendant received less than the maximum sentence provided by the municipal ordinance. State v. Hodgdon, 571 P.2d 557 (Ct. App. 1977), 14 CLB 261.

54. IDENTIFICATION PROCEDURES

§54.10. Suggestiveness of identification procedure

Court of Appeals, 1st Cir. Defendant was convicted of armed robbery of a federally insured bank and assault with a dangerous weapon.

In reversing the conviction, the court of appeals set forth the following requirements for introduction of "mug shots" at trial:

> "1. The Government must have a demonstrable need to introduce the photographs; and
>
> "2. The photographs themselves, if shown to the jury, must not imply that the defendant has a prior criminal record; and
>
> "3. The manner of introduction at trial must be such that it does not draw particular attention to the source or implications of the photographs."

Applying this test to the record, the court found that none of these requisites was present since (1) an in-court identification of the defendant had already been made; (2) the double-pose "mug shot" format of the photographs clearly implied that the defendant had a prior record; and (3) the introduction of the photographs was debated within the hearing of the jury. United States v. Fosher, 568 F.2d 207 (1978), 14 CLB 461.

Court of Appeals, 5th Cir. After his conviction of robbery by assault in Texas state court, defendant filed a habeas corpus petition contending that a pretrial "show up" confrontation was so suggestive as to cause a misidentification in violation of the due process clause.

In affirming the district court's denial of the petition, the Fifth Circuit found that the confrontation procedure, in the absence of a lineup, was unnecessarily suggestive since the police officers had made prejudicial remarks to the witness indicating "we wanted to make sure we had the right men." The court found, however, that the subsequent in-court identification by the witness "was sufficiently reliable so as to outweigh the corruptive effect of the asserted suggestive confrontation," applying the factors enumerated in Neil v. Biggers, 409 U.S. 188 (1972):

> "The factors considered include 'the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.'"

The court gave particular weight to the fact that the confrontation identification was made within one-and-one-half hours after the crime, thus increasing the likelihood of a reliable identification. Allan v. Estelle, 568 F.2d 1108 (1977), 14 CLB 459.

Court of Appeals, 6th Cir. Police asked two robbery victims to wait at the station while they went to bring in another suspect. Defendant was arrested and while still handcuffed, was escorted by police officers into a room where he was identified by two robbery victims. Defendant was convicted of armed robbery. On appeal defendant contended that the out-of-court identification was made under such suggestive circumstances that its admission into evidence denied him due process of law.

Held, in reversing the conviction, that by asking the witnesses that the defendant was the man whom they should identify:

"No explanation was offered why a lineup was not arranged, and why the witnesses were not separated at the time each made his identification. We conclude, therefore that, because the stationhouse identification was unreliable and because it was unnecessarily so, its admission at trial denied Webb the due process of law."

Webb v. Hvener, 549 F.2d 1081 (1977), 14 CLB 87.

Missouri Defendant appealed four convictions of armed robbery and the resultant twenty-year concurrent prison terms. Defendant's contention on appeal was that the lineup procedures were unduly suggestive because all four participants were also suspects.

Held, affirmed. After reviewing how the police conducted the lineup, the appellate panel ruled that the use of suspects, without none, cannot automatically impute suggestiveness to the identification process. State v. Adail, 555 S.W.2d 672 (Ct. App. 1977), 14 CLB 177.

55. RIGHT TO JURY TRIAL

§55.05. —Procedural requirements

U.S. Supreme Court Petitioner was convicted by a five-member jury of distributing obscene materials in a Georgia trial court. On certiorari to the U.S. Supreme Court, petitioner maintained that while a six-person jury is permissible under Williams v. Florida, 399 U.S. 78, a jury of less than six is unconstitutional.

In reversing and remanding, the Court concluded that a criminal trial by a jury of less than six persons substantially threatens Sixth and Fourteenth Amendments guarantees. The court noted that while *Williams* permitted the reduction in jury size to six, the Court had specifically reserved ruling therein whether a number smaller than six passed constitutional muster. At the time of the *Williams* decision in 1970, however, there was little empirical data indicating that the jury function was impaired by six-person juries. Subsequent data created serious doubt as to the wisdom and constitutionality of a reduction below six. Consequently, the Court decided to draw an arbitrary line at six, especially in view of the absence of any persuasive arguments proffered by Georgia that a reduction to five does not offend important Sixth Amendment interests. Further, the Court did not find any significant state advantage, such as administrative cost or time served, in reducing the numbers of jurors from six to five. Ballaw v. Georgia, 98 S. Ct. 1029 (1978), 14 CLB 452.

56. PROPRIETY OF EXERCISE OF POLICE POWER

§56.00. In general

Connecticut Defendant was found guilty of robbery in the second degree and was sentenced to not less than five years under a Connecticut mandatory minimum-sentencing law. On appeal, defendant argued that the statute was an impermissible usurpation of the judicial power of the legislature, in violation of the separation-of-powers provisions of state and federal constitutions.

Held, statute upheld and judgment affirmed. The Connecticut High Court noted that to be constitutionally valid, the statute must have a reasonable relation to the public health, safety, morality, and welfare. The court held that inasmuch as an essential element of second-degree robbery is the threatened use of a deadly weapon or dangerous instrument, the statute satisfied the test.

Defendant had also argued that the statute unconstitutionally delegated judicial power to the state's attorney because he could choose to prosecute for a crime that carries a mandatory minimum instead of a crime that carries no such pen-

alty. The court rejected this argument out-of-hand since there was no showing that the prosecutor had abused his discretion. State v. Darden, 372 A.2d 99 (1977), 14 CLB 95.

58. PROHIBITIONS AGAINST UNLAWFUL SEARCHES AND SEIZURES

SCOPE AND EXTENT OF RIGHT IN GENERAL

§58.00. What constitutes a search

Court of Appeals, D.C. Cir. The defendant appealed his conviction for possession of a stolen bank statement on the ground that the bank statement was the fruit of an unreasonable investigative "seizure" for his person. The record indicated that the police officer had questioned the defendant outside the bank after he noticed certain "suspicious behavior" and then "asked" the defendant to return inside the bank for further questioning.

The court of appeals affirmed the conviction, holding that the "reasonable, articulable grounds" needed for an investigative "stop," as required by Terry v. Ohio, 392 U.S. 1 (1968), were not necessary in this case:

> "It is our view that the police conduct at issue here involved a proper progression of escalating responses to circumstances which generated a mounting degree of suspicion that a crime had occurred. More particularly, we hold that (1) the initial approach on the sidewalk constituted a mere 'contact,' and not a compelled investigative stop, and therefore did not require reasonable, articulable grounds for suspecting that appellant had committed a crime; (2) the necessary basis for an investigative stop existed at least from the time Wylie produced the withdrawal slip, and nothing else, in response to Officer Franck's request for identification; and (3) the reentry into the bank for the purpose of further investigation was justified under the *Terry* stop doctrine, and did not amount to an arrest without probable cause."

United States v. Wylie, 569 F.2d 62 (D.C. Cir. 1977), 14 CLB 457.

Mississippi Defendant was convicted of manslaughter. Evidence admitted at trial included a towel showing holes and powder burns which the police had taken from the victim's home. Defendant contended on appeal that the evidence should have been suppressed as the fruit of an unreasonable and unlawful search and seizure.

Held, on appeal, the evidence was properly admissible as the product of a continuing search and investigation. Defendant had called the sheriff to her home. When the police arrived at the house, defendant handed the sheriff a pistol and told him that she had shot her husband. The sheriff made a preliminary examination of the house and discovered the victim's body.

After examining the premises, the sheriff went to the hospital whereby he instructed one of his deputies to return to defendant's residence to continue the investigation there. During this investigation, which took place about 25 minutes after the first, the towel was found.

The Mississippi Supreme Court held that the search was not unreasonable because it was merely a continuation of the initial investigation permitted by defendant. To hold otherwise would require that a search, once validly commenced, could only continue without interruption by the *same* police officers who initiated it. Crum v. State, 349 So. 2d 1059 (1977), 14 CLB 171.

§58.05. Constitutionally protected areas

Court of Appeals, 8th Cir. Defendant, a prisoner in a state penitentiary, was convicted of causing a threatening letter to

be delivered through the mails. On appeal, defendant contended that the warrantless seizure of a typewriter from his prison cell violated the Fourth Amendment. Defendant's motion to suppress the typewriter was denied.

Held, on appeal, that "although prisoners do not forfeit all their Fourth Amendment rights upon incarceration, they do not retain the same measures of protection afforded nonincarcerated individuals. . . . The reduced measure of Fourth Amendment protection afforded prisoners stems from legitimate institutional needs . . . as well as prisoners' diminished expectations of privacy." The court held that, where defendant openly kept a typewriter in his cell, he had no reasonable expectation of privacy as to the typewriter. Thus, there was probable cause for the seizure and the motion to suppress was properly denied. United States v. Stumes, 549 F.2d 831 (1977), 14 CLB 90.

Court of Appeals, 9th Cir. One of the many issues raised in the appeal from the much-publicized Patty Hearst case was whether electronic interception of a conversation between a jail prisoner and a visitor falls within the scope of the Fourth Amendment. Unknown to the defendant or her visitor, jail officials had recorded and transcribed the conversation between the two by means of an electronic device. Portions of the transcript were later read to the jury during the course of the trial.

The defendant attempted to distinguish Lanza v. New York, 370 U.S. 139 (1962), where the Supreme Court declared that no Fourth Amendment protection attached to jailhouse conversations, by arguing that the Court's later decision in Katz v. United States, 389 U.S. 347 (1967), effectively overruled *Lanza* or at least significantly reduced its precedential value. In *Katz*, the Court held that the government's electronic interception of Katz's conversation in a phone booth violated the Fourth Amendment.

In rejecting this argument, the court of appeals noted that *Lanza* and *Katz* are not necessarily incompatible, citing the rule that had evolved in that court:

> "An intrusion by jail officials pursuant to a rule or policy with a justifiable purpose of imprisonment or prison security is not violative of the Fourth Amendment. . . . Under this rule, a prisoner is not deprived of all Fourth Amendment protections; the rule recognizes, however, the government's weighty, countervailing interests in prison security and order." [Citations omitted.]

In affirming the conviction, the court concluded that once the government establishes a justifiable purpose of imprisonment or prison security, "the Fourth Amendment question is essentially resolved in its favor." United States v. Hearst, 563 F.2d 1331 (1977), 14 CLB 252.

§58.30. —Automobile searches

Court of Appeals, 4th Cir. Defendants were stopped by military police following a bulletin describing three robbers. Defendants matched the description of the robbers and were observed driving from the direction of the robbery within minutes of the robbery. When stopped, defendants refused to give their names. When they got out of the car, the police observed that one had a gun and another had a stocking mask protruding from his pocket. The officers searched the car for weapons. Defendants were then arrested.

At the police station the officers continued their efforts to secure defendants' identities. One officer searched the car again for evidence of identity and found several wallets. A routine inventory search was later conducted. Defendants moved to suppress the first of the warrantless search of the car. That motion was denied.

Held, on appeal, that the facts and cir-

cumstances were sufficient to justify a warrantless vehicle search incident to an arrest. The court held that the subsequent search made in an effort to secure defendants' identities was valid, as was the routine inventory search subsequently conducted. United States v. Colcough, 549 F.2d 937 (1977), 14 CLB 88.

Florida Defendant was stopped while driving his brother's car and was arrested on an outstanding warrant. The car was impounded. He was not informed that he could choose to leave the car at roadside (it did not constitute a traffic hazard) nor was his passenger permitted to drive the car away, although she had a valid operator's license.

During a routine inventory search of the car, begun immediately after defendant was arrested, the officers found a pistol under the front seat and a sawed-off shotgun in the trunk. Defendant was later convicted on the firearm possession charges.

On appeal, defendant contended that the inventory search violated his Fourth Amendment rights. Held, reversed for new trial, since the trial court should have granted defendant's motion to suppress.

The trial court had based its decision on the considerations that the automobile constituted a traffic hazard (rejected outright by the appellate court) and that public policy does not permit third-person volunteers (i.e., the passenger) to drive another person's car from the scene of an arrest because of insurance coverage issues. As to this second exigency, the appellate panel noted that the record was barren of any insurance coverage claims and that the trial court's treatment of this ground was too speculative to be adopted.

Thus, the court concluded that the police were under a duty to advise defendant that alternative steps could be taken to avoid impoundment. State v. Session, 353 So. 2d 855 (Ct. App. 1977), 14 CLB 372.

New York Two Nassau County policemen, while stationed in an area where several burglaries had recently been reported, observed a Buick automobile proceeding towards an intersection where a stop sign was located. On the way to the corner, the Buick slowed down from its speed of about five miles per hour to pause for a "second or two" during which the three men who were its occupants were seen to turn their heads toward a nearby bar. Continuing on, the automobile then came to a standstill at the stop sign where, the police testified, the three men "glanced" toward a second car. Thereupon the police, activating their official siren and lights, forced the motor vehicle to pull over and stop at the curb.

Defendant, who was the driver of the vehicle, stepped out and walked toward the police officers. When asked to produce a driver's license he responded that he possessed none.

Also, although the passengers and defendant claimed that the vehicle was being used with the permission of the mother-in-law of one of the passengers (later established as true), no one had the vehicle registration form. The passengers were then ordered out of the car and "patted down." A bullet clip was discovered during the pat down and a gun was found under the front seat of the vehicle. From his subsequent conviction for felonious possession of a weapon, the defendant appealed, contending that the weapon and the bullet clip should have been suppressed since their discovery was the fruit of an improper search and seizure.

Held, reversed. While the police could properly have kept the defendant under observation, there was no objective evidence of criminal activity to justify the stopping of the defendant's vehicle, even though the officers had testified that they "felt that a crime was about to be committed." Concluding that mere "hunch" or "gut reaction" will not do, the New

York Court of Appeals counseled the police to show "patience rather than precipitancy." People v. Sobotker, 373 N.E.2d 1218. (Ct. App. 1978), 14 CLB 471.

§58.65. Stop and frisk

U.S. Supreme Court While on routine patrol, two Philadelphia police officers stopped a vehicle with an expired license plate, for the purpose of issuing a traffic summons. One of the officers approached and asked defendant to step out of the car and produce his owner's card and operator's license. Defendant complied, whereupon the officer noticed a large bulge under defendant's sports jacket. When the frisk produced a gun, defendant was arrested and indicted for carrying a concealed deadly weapon and for unlawfully carrying a firearm without a license. His motion to suppress was denied by the state trial court but his conviction was reversed by the Pennsylvania Supreme Court, holding that the revolver had been seized in violation of the Fourth and Fourteenth Amendments.

In reversing, the Supreme Court disagreed with the state court's conclusion that the order to defendant to get out of the car constituted an impermissible "seizure."

> "We think it too plain for argument that the State's proffered justification – the safety of the officer – is both legitimate and weighty. 'Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties.' *Terry v. Ohio, supra,* 392 U.S. at 23, 88 S.Ct. at 1881. And we have specifically recognized the inordinate risk confronting an officer as he approaches a person seated in an automobile.
>
> "Against this important interest we are asked to weigh the intrusion into the driver's personal liberty occasioned not by the initial stop of the vehicle, which was admittedly justified, but by the order to get out of the car. We think this additional intrusion can only be described as *de minimis.* What is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer's safety."

The Court also found that the search was proper once the bulge in the jacket was observed. Pennsylvania v. Mimms, 98 S. Ct. 330 (1977), 14 CLB 250.

BASIS FOR MAKING SEARCH AND/OR SEIZURE

§58.80. —Sufficiency of underlying affidavit

Maryland Peterson was found guilty of six drug offenses. On appeal, he argued that the information offered in the affidavit to support the issuance of the search warrant was "stale"; that the facts and circumstances constituting probable cause were so remote from the date of the affidavit as to render it improbable that the law was being violated at the time the warrant was issued.

Held, on appeal, the affidavits indicating that defendant was dealing in drugs from his home for a period of three months were sufficient to support the issuance of the search warrant.

The court found that the affiant had reasonable grounds to believe that there would be narcotics in Peterson's apartment on the date the warrant was issued. By its nature, the court wrote, traffic in illegal drugs is ordinarily a regenerating activity and there was clear indication here that the activity was continual, involving a course of conduct regularly followed over a protracted period of time. It is probable, therefore, that the defendant would keep contraband in his apartment. Peterson v. State, 379 A.2d 164 (1977), 14 CLB 267.

Minnesota Defendant-nursing home owners were convicted of presenting false

claims for state reimbursement and they appealed, contending, among other things, that the search warrant used to seize books and records was invalid. Held, on appeal, affirmed.

Pursuant to state rules, an auditor from the state's Department of Public Welfare was permitted to enter the home to begin a "field audit" of its books and records. During his field audit, the state auditor noted what he felt were numerous questionable items and the nursing home owners finally asked him to leave.

The audit director submitted the matter to the attorney general. A search warrant was secured, and both the nursing home and the owners' nearby residence were searched.

The search warrant had authorized the seizure of all records and documents regarding certain purchases, and virtually all bookkeeping records used to prepare the reimbursement report filed with the state. In upholding the warrant and the convictions, the Minnesota Supreme Court ruled that although the defendants contended that the warrant was overly broad, since it listed "every conceivable business and cost-related accounting record in the nursing home," the warrant was as specific as it could be under the circumstances.

The court had little trouble in upholding the sufficiency of the underlying affidavit. The field auditor had detailed his suspected findings, and had reported his interviews with numerous unnamed employees at the facility. The court ruled that the state auditor's allegations alone supported the conclusion that probable cause existed. State v. Ruud, 259 N.W.2d 567 (1977), CLB 268.

§58.85. Validity of warrant on its face

U.S. Supreme Court In 1971, the Palo Alto police obtained a warrant to search the premises of the Stanford University student newspaper. They were looking for photographs (or negatives) taken at a campus demonstration in which nine policemen were injured. The editors argued that this action was a violation of their First and Fourth Amendments rights. The federal district court agreed, holding that the use of a search warrant for materials in the possession of someone not accused of a crime was a violation of the Fourth Amendment right to be free from unreasonable searches and seizures. It held that a subpoena duces tecum would have been appropriate in this case as a way of securing the evidence.

The Supreme Court reversed the lower court's decision. Said the Court:

> "It is untenable to conclude that property may not be searched unless its occupant is reasonably suspected of crime and is subject to arrest. . . .
>
> "As we understand the structure and language of the Fourth Amendment and our cases expounding it, valid warrants to search property may be issued when it is satisfactorily demonstrated to the magistrate that fruits, instrumentalities or evidence of crime is located on the premises."

As for the use of a subpoena to obtain the evidence, the court stated:

> "In any event, it is likely that the real culprits will have access to the property, and the delay involved in employing the subpoena duces tecum, offering as it does the opportunity to litigate its validity, could easily result in the disappearance of the evidence, whatever the good faith of the third party."

The dissent saw First Amendment injury in that an unannounced search would result in physical disruption in the operation of the newspaper. Also, the newspaper could encounter difficulties in guaranteeing confidentiality to its sources. Finally, in Justice Stevens' dissent, the Fourth Amendment issue was addressed:

"The only conceivable justification for an unannounced search of an innocent citizen is the fear that, if notice were given, he would conceal or destroy the object of the search. Probable cause to believe that the custodian is a criminal, or that he holds a criminal's weapons, spoils, or the like, justifies that fear, and therefore such a showing complies with the clause. But if nothing said under oath in the warrant application demonstrates the need for an unannounced search by force, the probable cause requirement is not satisfied. In the absence of some other showing of reasonableness, the ensuing search violates the Fourth Amendment."

Zurcher v. Stanford Daily, 98 St. Ct. 1970 (1978), 14 CLB 451.

§58.95. Manner of execution

Court of Appeals, 2d Cir. Defendants were convicted in the District Court for the Eastern District of New York of conducting illegal gambling businesses in violation of 18 U.S.C. § 1955, and they appealed. The major issue placed before the Second Circuit was whether Title III of the Omnibus Crime Control Bill of 1968 prohibits all surreptitious police entries to install, repair, or remove court-authorized bugs.

In affirming the convictions, the court first noted the divergence of opinions on the issues within the federal judiciary since the District of Columbia Circuit decided that a separate warrant was required. See United States v. Ford, 553 F.2d 146 (D.C. Cir. 1977). The Second Circuit, however, felt compelled to differ with the conclusion of the only other circuit court to address the issue, and based its decision on the following logical premise:

"But the most reasonable interpretation of the orders in this case, granting authorization to bug private premises, is that they implied approval for secret entry. Indeed, any order approving electronic surveillance of conversations to be overheard at a particular private place, must, to be effective, carry its own authority to make such reasonable entry as may be necessary to effect the 'seizure' of the conversations."

United States v. Scafidi, 564 F.2d 633 (1977), 14 CLB 366.

Court of Appeals, 4th Cir. In response to the government's application for an order authorizing interceptions of oral communications and surreptitious entries on commercial premises, the Maryland District Court denied the application on the ground that, under the Fourth Amendment standard of "reasonableness, the government was required to establish some "paramount" or "compelling" interest to justify judicial authorization of the surreptitious entry needed to install the bug.

In reversing and remanding, the Fourth Circuit decided the threshold issue of whether Title III of the Omnibus Crime Control Act authorized surreptitious entries in favor of the government. While recognizing that Title III is devoid of any explicit language authorizing or prohibiting such entries, the court concluded "that covert entry by federal officials is congressionally authorized for, in our opinion, any other conclusion would run counter to the principle that we should attempt to effectuate the purpose of federal legislation and avoid interpretations which produce absurd or nugatory results."

Having decided that Congress intended to leave the manner of installation of listening devices to the "informed discretion of the district judge," the court next faced the issue of what standard should be applied:

"Since in the absence of exigent circumstances the Fourth Amendment commands compliance with the warrant requirement, we would normally coun-

tenance secret entry by federal agents for the purpose of installing, maintaining, or removing listening devices only under the following conditions: (1) where, as here, the district judge to whom the interception application is made is apprised of the planned entry; (2) the judge finds, as he did here, that the use of the device and the surreptitious entry incident to its installation and use provide the only effective means available to the Government to conduct its investigation; and (3) only where the judge specifically sanctions such an entry in a manner that does not offend the substantive commands of the Fourth Amendment."

The standard, then, for granting a court order permitting surreptitious entry is one of "reasonableness," which is the same test to be applied to a wiretap or "bugging" application. *In re* United States, 563 F.2d 637 (1977), 14 CLB 253.

§58.110. Necessity of obtaining a warrant

Arkansas Defendant was convicted of possession of marijuana, and he appealed. Held, on appeal, reversed and remanded.

Defendant was arrested after intensive surveillance and investigation by Little Rock, Ark. police officers. An informant told police that defendant had earlier sent an empty suitcase out of state and would go to the airport to retrieve the bag, now full of contraband. The informant knew which flight the luggage would be on, and many other details, including how the bag was to be delivered and "passed" inside the terminal.

Police observed that the bag was claimed by another man and was taken to a taxicab in which defendant was waiting. Police followed the taxicab and finally stopped the vehicle and asked defendant and his companion to step away from the taxi. Without the consent of either of them, police told the taxicab driver to open the trunk of the vehicle. Police then opened the bag and placed both men under arrest.

The state high court noted at the outset that the police clearly had probable cause to believe that the green suitcase belonging to defendant would contain contraband when they seized and opened it. However, the police lacked any exigent circumstance to justify the warrantless search, the court concluded.

The state offered nothing to indicate any impracticability in obtaining a search warrant, since the confidential informant (of proven past reliability) was well acquainted with defendant's planned movements at the airport.

As the court concluded: "[A] person's expectations of privacy in personal luggage are substantially greater than in an automobile." Sanders v. State, 559 S.W.2d 704 (1977), 14 CLB 369.

§58.120. Search incident to a valid arrest

New York Defendant was convicted of selling a controlled substance, and he appealed.

At the trial, an undercover officer had testified that he had purchased two bags of heroin from defendant and had given him three $10 bills. The officer gave this information to his sergeant along with a description of defendant. The sergeant then went to the vicinity of the sale, confronted defendant and frisked him. When defendant emptied his pockets the sergeant saw three $10 bills, but no narcotics. Defendant was released, but was arrested one month later.

Held, on appeal, reversed. A warrantless search, made on the basis of probable cause to arrest, is illegal where an arrest is not made until one month after the search. Testimony, with respect to the discovery of the money, is reversible error.

As the court stated: "It may be said that the search and arrest must constitute a single *res gestae*. The fact that the search precedes the formal arrest is irrelevant as long as the search and arrest are

nearly simultaneous so as to constitute one event." People v. Evans, 43 N.Y.2d 169 (1977), 14 CLB 367.

§58.125. —Probable cause

Court of Appeals, 4th Cir. Defendant was convicted before the district court of possessing, with intent to distribute, a controlled substance. At the hearing on the motion to suppress before the trial, it was revealed that defendant's arrest was precipitated by a tip from an unnamed informant who was known to one of the officers but who had no prior record of supplying reliable information.

On appeal to the Fourth Circuit, defendant contended that the officers who made the warrantless arrest of him lacked probable cause because the informant's reliability had not been previously established, relying heavily upon Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969). The court, however, summarily dismissed this argument, citing United States v. Harris, 403 U.S. 573, 91 S.Ct. 2075 (1971).

In *Spinelli,* the court found that affiant had offered no reason to support the conclusion that the informant was "reliable," but the Fourth Circuit expressed the view that "any idea, however, that under *Spinelli* an informant's prior track record for accurate information is the indispensable touchstone of 'reliability' was dispelled by the Court in *Harris,*" where the court held that knowledge of a suspect's reputation was a practical consideration that may be relied on in assessing the reliability of an informant's tip.

In affirming the district court, the court concluded as follows: "In the present case, the variety of facts which were verified by the police not only attested to the reliability of the informant but supported the conclusion that his information had a reasonably substantial basis in fact." United States v. Branch, 565 F.2d 274 (1977), 14 CLB 357.

ELECTRONIC EAVESDROPPING

§58.145. In general

Court of Appeals, D.C. Cir. Defendants, charged with various drug offenses, moved to suppress evidence obtained by electronic surveillance of their conversations conducted by covertly placed "bugs." The district court held that the judicial authorization for the electronic surveillance had been too broad and suppressed the evidence. The warrant in question authorized police officers to make entry day or night by any means they believed necessary and the need for such authorization was not supported by affidavit.

In affirming the district court opinion, the court of appeals rejected the government's contention that surreptitious entry into private premises for the purpose of installing, maintaining, or reviewing bugging equipment does not fall within the scope of the Fourth Amendment. Also rejected was the government's contention that no warrant was needed to enter the premises to place the "bugs" because a proper warrant authorizing seizure of the conversations had already been issued. The court held that each entry must be supported by a warrant, and the warrant must be supported by an affidavit setting forth sufficient facts to justify the need for a surreptitious entry. Since the affidavit in this case was devoid of such facts, the warrant was defective and the entries were unconstitutional. United States v. Ford, 553 F.2d 146 (1977), 14 CLB 163.

§58.155. —Recording devices

U.S. Supreme Court On the basis of an FBI affidavit stating that certain individuals were conducting an illegal gambling enterprise and that there was probable cause to believe that two telephones were being used to further the illegal activity, the district court authorized the FBI to install and use pen registers which record

the numbers dialed without intercepting the oral communications. Over the objection of the telephone company, the court also directed the company to assist the FBI in the installation of the devices. The Court of Appeals for the Second Circuit, reversing in part, held that it was an abuse of discretion to order the respondent to assist in the installation and operation of the pen registers.

In reversing, the Supreme Court determined that the installation of pen registers is not governed by the provisions of Title III of the Omnibus Crime Control Act because pen registers only record the phone number called and do not intercept the conversation. That is, the contents of the communications are not acquired.

Turning to the issue of whether a third party may be required to assist the government, the Court, while agreeing that "unreasonable burdens may not be imposed," concluded that "the order issued here against respondent was clearly authorized by the All Writs Act and was consistent with the intent of Congress."

In reaching its decision, the Court was influenced by the fact that the respondent is "a highly regulated public utility with a duty to serve the public," and that the company itself regularly employs such devices without court order. Nor could the surveillance ordered by the district court be carried out without the assistance of the telephone company. United States v. New York Tel. Co., 98 S.Ct. 364 (1977), 14 CLB 248.

§58.165. Procedure for suppressing fruits of eavesdropping

Court of Appeals, 2d Cir. Defendants were charged with criminal contempt for failing to testify in a criminal trial after being granted use immunity. On the day they were scheduled to testify, defendants submitted a claim under 18 U.S.C. § 3504 that their examination was to be based upon the products of unlawful surveillance, and they called upon the government to "affirm or deny" the existence of illegal wiretaps. In response, the Assistant U.S. Attorney on the case submitted an affidavit stating that there had been no electronic surveillance, based upon his knowledge and a review of the files of the relevant agency. The district judge dismissed the indictment on the ground that the government's response was inadequate.

The Second Circuit reversed, holding that under the circumstances defendants' claim was not timely submitted. Defense counsel had notice that defendants would be subpoenaed more than one month prior to trial, and they had knowledge, at that time, of the facts upon which their claims of illegal electronic surveillance were based. Nevertheless, they waited until the first day of trial to make their motion. The government, on the other hand, responded to the motion promptly, as best it could, and a check with all federal agencies would have taken several weeks. Thus, defendants waived their right by failing to timely object. United States v. Yanagita, 552 F.2d 940 (1977), 14 CLB 164.

CONSENT AND WAIVER

§58.185. —Need for warning

Colorado Police officers, investigating an incident during which someone was beaten severely with a hammer, asked the father of Hayhurst, one of the young men then considered a suspect, whether they could search the van that the son had used the night before.

The father and the son were both read their *Miranda* rights and both acknowledged that they understood their rights. When the police asked permission to look in the van, young Hayhurst, at his father's direction, opened the side door. The officers discovered splattered blood and then asked that the rear doors be opened for inspection. Once again *Miranda* rights

were given, and once again the Hayhursts acquiesced. This time the police found a hammer and another pool of blood.

The officers had never advised the Hayhursts that they had the right to refuse consent for a search.

The trial court suppressed the physical evidence recovered in the examination of the van, and the people appealed. Held, reversed. The people already have the heavy burden of showing the voluntariness of a consent to search. It is not necessary to impose another warning requirement on police officers. Here, the people established that consent to search was given voluntarily, knowingly and intelligently, and the evidence should not have been suppressed. People v. Hayhurst, 571 P.2d 721 (1977) (en banc), 14 CLB 266.

§58.190. —Voluntariness of consent

Court of Appeals, 9th Cir. Border patrol agents found suspicious-looking burlap bags while looking for illegal aliens under defendant's house. The agents approached defendant and told him that they suspected the bags were filled with marijuana. At that point, defendant said, "I don't know, do you want to see?" Police then opened the sacks. Defendant was convicted of possession of marijuana.

Held, in reversing the conviction, that the warrantless search was unreasonable and illegal. The government had not obtained a warrant and failed to prove exigent circumstances. The court held that defendant's acquiescence did not constitute consent to the search but a surrender of evidence after the search was completed, and determined that the trial court's finding of voluntariness was clearly erroneous. United States v. Pacheo-Ruiz, 549 F.2d 1204 (1976), 14 CLB 91.

Court of Appeals 10th Cir. Following his conviction before the Kansas District Court for possession of an unregistered machine gun, defendant appealed to the Tenth Circuit, arguing that the undercover agent's presence in his home for purposes of gathering evidence of illegal possession of a firearm was an unlawful search and seizure in violation of the Fourteenth Amendment.

While recognizing that defendant had an arguable Fourth Amendment claim, the circuit court found that the "flaw in appellant's argument lies in the fact that the agent entered the house by invitation and took away nothing that was not voluntarily given or sold by appellant." See Lewis v. United States, 385 U.S. 206.

The defendant attempted to distinguish *Lewis* by arguing that while in *Lewis* the agent was specifically invited into the home for an illegal purpose, in this case the agent came only to investigate and no firearms changed hands until the third visit. The court, however, found this to be a distinction without any real legal difference:

> "We do not believe that the purpose of either the defendant in extending the invitation, or the agent in accepting it is the critical factor. The fact is that the agent entered only at defendant's invitation and removed only that which was freely offered. 'What a person knowingly exposes to the public even in his own home or office, is not a subject of Fourth Amendment protection.' *Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576, *citing Lewis v. United States, supra.*"

United States v. Oakes, 564 F.2d 384 (1977), 14 CLB 358.

§58.195. —Third-party consent

Court of Appeals, 6th Cir. On appeal from his conviction of armed bank robbery, defendant challenged the trial court's holding that a search and seizure can pass constitutional muster when an otherwise valid third-person consent to a search was preceded by a refusal to consent by defendant.

The Sixth Circuit affirmed, relying on United States v. Matlock, 415 U.S. 164 (1974), which focused on whether or not the "permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected."

In short, the court found that defendant's prior refusal to consent was irrelevant since "this additional fact does not increase a reasonable expectation of privacy." United States v. Sumlin, 567 F.2d 684 (1977), 14 CLB 462.

SUPPRESSION OF EVIDENCE IN GENERAL

§58.210. Standing

Court of Appeals, 2d Cir. In an appeal from an order of the district court suppressing evidence against five named defendants, the sole issue before the court of appeals was whether defendant had standing to contest a warrantless search of a garage in which stolen property was found. The structure in question was a two-story building with a sign over the garage bearing the name of a transportation company. In fact, the company leased all of the building, and defendants were licensees or guests in the upstairs offices.

In affirming the lower court order, the court noted that there is automatic standing to contest a warrantless search when possession is an essential element of the offense, citing United States v. Galante, 547 F.2d 733 (2d Cir. 1976). As to the conspiracy count, however, the court had to inquire whether defendants had actual, as distinct from automatic, standing. The test for actual standing is that "anyone legitimately on premises where a search occurs may challenge its legality . . . when its fruits are proposed to be used against him." (Jones v. United States, 362 U.S. 257 (1960).) Since defendants were legitimately on the premises, they had standing to challenge the warrantless search.

The court also rejected the government's contention that defendants' reasonable expectation of privacy extended only to the upstairs office, but not to the garage below. United States v. Banneiman, 552 F.2d 61 (1977), 14 CLB 159.

Court of Appeals, 9th Cir. Defendant was convicted of various criminal counts arising from his participation in a scheme to misappropriate funds and facilities of two proprietary hospitals. On appeal, he argued that there was a "target" doctrine in which one against whom the search was directed has per se standing to object to evidence seized in the search.

Affirming the conviction, the Ninth Circuit noted that Jones v. United States, 362 U.S. 257 (1960), adopted a rule as to automatic standing only for cases wherein the defendant is charged with an offense which includes, as an essential element, possession of the seized evidence. The U.S. Supreme Court, it further noted, did not adopt Justice Fortas's view that merely being a "target" of a search is sufficient to confer standing. United States v. Cella, 568 F.2d 1266 (1978), 14 CLB 457.

FRUITS OF THE POISONOUS TREE

§58.260. Evidence held admissible

Court of Appeals, 2d Cir. Defendant was convicted of armed bank robbery following a ruling by the district court that, even though the "John Doe" warrant did not contain a name or description by which defendant could be identified with reasonable certainty, as required under Rule 4(c)(1) of the Federal Rules of Criminal Procedure, the trial court held the warrant valid because "extrinsic evidence" was available which provided clear, sufficient identification of defendant.

The Second Circuit disagreed with the trial judge's ruling, holding that "to com-

ply with Rule 4(c)(1) and the fourth amendment the name or a particularized description of the person to be arrested must appear on the face of the 'John Doe' warrant." Furthermore, the record did not indicate the presence of any of the exigent circumstances required for a valid warrantless arrest in a home.

Despite this finding that the arrest was illegal, the court declined to suppress the photograph of the defendant and his palm print taken following his arrest, reasoning as follows:

> "Had the agents waited outside of Jarvis' home, they could have arrested him, when he emerged, based solely on probable cause. They would then have obtained the palmprints and a photo, the evidence which Jarvis seeks to suppress. The illegal arrest thus was not a 'but for' cause for the introduction of the evidence appellant seeks to suppress. *United States v. Galante*, 547 F.2d 733, 742 (2d Cir. 1976) (Kaufman, C.J., concurring)."

Defendant's conviction was, therefore, affirmed. United States v. Jarvis, 560 F.2d 494 (1977), 14 CLB 259.

§58.265. —Lack of "primary taint"

U.S. Supreme Court A police officer (Biro), while taking a break in respondent's flower shop and conversing with an employee of the shop (Hennessey), noticed an envelope with money protruding therefrom lying on the cash register. Upon examination, he found it contained not only money but policy slips. Biro then placed the envelope back on the register and, without telling Hennessey what he had found, asked her to whom the envelope belonged. She told him it belonged to respondent. Biro's finding was reported to a local detective and to the FBI. About six months after the incident, respondent was summoned before a federal grand jury and testified that he had never taken policy bets at his shop, but Hennessey testified to the contrary, and shortly thereafter respondent was indicted for perjury. Hennessey testified against respondent at his trial, but after a finding of guilt, the district court granted respondent's motion to suppress Hennessey's testimony and set aside that finding. The Second Circuit Court of Appeals affirmed, noting that the "road" to that testimony from the concededly unconstitutional search was "both straight and uninterrupted."

In reversing and remanding, the U.S. Supreme Court found that the court of appeals *erred in concluding that* the degree of attenuation between Biro's search of the envelope and Hennessey's testimony at the trial *was not* sufficient to dissipate the connection between the illegality of the search and challenged testimony. In doing so, the Court also rejected "the Government's suggestion that we adopt what would in practice amount to a *per se* rule that the testimony of a live witness should not be excluded at trial no matter how close and proximate the connection between it and a violation of the Fourth Amendment." United States v. Ceccolini, 98 S. Ct. 1054 (1978), 14 CLB 453.

59. PROHIBITION AGAINST SELF-INCRIMINATION

SCOPE AND EXTENT OF RIGHT IN GENERAL

§59.00. Prosecutor's duty to advise witness of his privilege

Court of Appeals, 3d Cir. On appeal from his conviction for making a false declaration before a grand jury, defendant argued that the conviction should be reversed because of misleading statements by the prosecutor to the effect that the defendant was not a target witness.

The Third Circuit rejected this argument even though it found that the defen-

dant was, in fact, a target, citing United States v. Mandujano, 425 U.S. 564 (1975), where it was held that only *Miranda* warnings need be given a target in the grand jury. The court distinguished United States v. Jacobs, 547 F.2d 772 (2d Cir. 1976), *cert. denied* 431 U.S. 937 (1977), where the Second Circuit used its general supervisory powers to reverse for failure to give target warnings, on the ground that the practice of giving target warnings was not so "long-established" in the Third Circuit as it was in the Second Circuit. United States v. Crocker, 568 F.2d 1049 (1977), 14 CLB 460.

TESTIMONY AND RECORDS

§59.25. Testimony before grand jury

U.S. Supreme Court Respondent, who was suspected with others of possible implication in a theft, was subpoenaed to appear as a witness before the District of Columbia grand jury. The prosecutor did not advise respondent before his appearance that he might be indicted for theft, but respondent was given a series of warnings after being sworn, including the warning that he had a right to remain silent. Respondent nevertheless testified and subsequently was indicted for the theft. The trial court granted respondent's motion to suppress his grand jury testimony and to quash the indictment on the ground that it was based on evidence obtained in violation of his Fifth Amendment privilege against compelled self-incrimination. The Court of Appeals of the District of Columbia affirmed the suppression order.

In reversing and remanding, the Supreme Court pointed out that the Fifth Amendment proscribes only the use of self-incriminating statements that are made under compulsion. In the record before it, the Supreme Court found no compulsion existed since the comprehensive warnings defendant received dissipated any element of compulsion that may have otherwise been present. "Indeed it seems self-evident that one who is told he is free to refuse to answer questions is in a curious posture to later complain that his answers were compelled." Since the Court found the absence of compulsion, it did not reach the question whether the warnings given defendant were constitutionally required. United States v. Washington, 97 S. Ct. 1814 (1977), 14 CLB 83.

NONTESTIMONIAL ASPECTS

§59.85. D[illegible] driving tests

Ohio Defendant, convicted of drunken driving, argued on appeal that breath alyzer test results were erroneously admitted into evidence because the police officers failed to observe defendant for twenty minutes before taking a sample, as required by statute. The intermediate court had reversed the conviction.

Held, on appeal, reversed. Defendant presented no evidence at trial to suggest that some foreign matter might have been ingested, but argued only "from an academic position" that since there may have been brief moments when officers failed to observe defendant, he could have ingested something.

The appellate court below had suggested that the twenty-minute observation rule had not been satisfied because the police officer had lost sight of defendant when the officer exited his patrol car and walked around the vehicle to approach defendant's vehicle.

The state high court rejected the appellate court's reading of the twenty-minute observation rule and decided that the officer's testimony that defendant did not eat (or regurgitate) anything during the twenty minutes was sufficient to lay the foundation for admission of the test results. State v. Steele, 370 N.E.2d 740 (1977) 14 CLB 374.

60. RIGHT TO SPEEDY TRIAL

§60.15. —Delay in instituting prosecution

U.S. Supreme Court More than eighteen months after federal criminal offenses were alleged to have occurred, respondent was indicted for committing them. Little additional information was developed beyond an investigative report made a month after the crimes were committed. Claiming that the preindictment delay during which material defense testimony had been lost deprived him of due process, respondent moved to dismiss the indictment. The district court, which found that the delay had not been explained or justified and was unnecessary and prejudicial to respondent, granted the motion to dismiss. The court of appeals affirmed, concluding that the delay, which it found solely attributable to the government's hope that other participants in the crime would be discovered, was unjustified.

The Supreme Court reversed. Defendant's Sixth Amendment right to a speedy trial was not violated because that guarantee does not attach until the defendant has been arrested or indicted. Although defendant may have been prejudiced by the preindictment delay, he was not deprived of due process because the delay by the government was for a legitimate purpose; an attempt to obtain evidence against others who may have participated in the crime. In view of the good-faith nature of the delay, the district court overstepped its bounds by dismissing the indictment. To hold otherwise, the court noted, would actually be deleterious to the interests of potential defendants: "From the perspective of potential defendants, requiring prosecutions to commence when probable cause is established is undesirable because it would increase the likelihood of unwarranted charges being filed, and would add to the time during which defendants stand accused but untried." United States v. Lovasco, 97 S. Ct. 2044 (1977), 14 CLB 82.

§60.25. —Interpretations by state courts

Wisconsin In December 1973, defendant was arrested and charged with murder, armed robbery, and other crimes. In January 1974, he was committed to the state department of health and social services to determine his competency to stand trial. In October 1974, the trial judge ruled that defendant was incompetent and ordered him recommitted. In September 1975, a second competency hearing was conducted and, upon a showing that defendant was still incompetent and was making poor progress, the trial court continued criminal proceedings to allow civil commitment proceedings to begin.

Defendant was committed civilly but, within three months, was discharged. Thereafter, the prosecutor moved the trial court to order defendant to submit to a psychiatric examination. The trial judge ordered an examination, to which defendant objected.

Held, on appeal, that the trial court had authority to order an examination to determine competency to stand trial. The court ruled that speedy-trial claims are to be decided on a case-by-case basis. The "mere fact of confinement beyond the time when it appears likely that a defendant will recover his competency, whether under the original commitment by the criminal process or by a subsequent civil commitment, does not ipso facto mandate a dismissal on grounds of denial of speedy trial." State *ex rel.* Porter v. Wolke, 258 N.W.2d 881 (1977), 14 CLB 169.

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PROTEST AND REPLY

"Three Burlington residents may be scratching their heads over the reply to a message they sent President Carter. Maggie Libby, Eric White and Austin Gardner sent Mr. Carter a Mailgram objecting to the use of paraquat to kill Mexican-grown marijuana because the herbicide has contaminated some plants sold to Americans, posing a health danger.

" 'We deplore your Mexican marijuana spraying policy whose ultimate outcome is the poisoning of our youth,' they told Mr. Carter. 'How can the United States Government spend millions of dollars to murder its people? Stop poisoning us.'

"The reply, written on White House stationery and signed by a presidential staff assistant, Landon Kite, said: 'President Carter has asked me to reply to your recent message and express his appreciation for your kind words and good wishes. He is most grateful for your support and sends his thanks and best wishes.' "

—Associated Press
August 6, 1978